

United States
Circuit Court of Appeals

For the Ninth Circuit. 4

MARYLAND CASUALTY COMPANY, a corporation,

Appellant,

vs.

MAZILLA TIGHE, AH CHONG and LEONG
CHEUNG,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United
States for the Northern District of California,
Southern Division.

FILED

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PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and for the Northern District of California, Southern Division.

Equity No. 4279 S

MARYLAND CASUALTY COMPANY, a corporation,

Plaintiff,

vs.

MAZILLA TIGHE, AH CHONG and LEONG CHEUNG,

Defendants.

COMPLAINT FOR DECLARATORY RELIEF,
ETC.

Plaintiff, Maryland Casualty Company, brings this suit under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, section 274d, 28 U.S.C.A. section 400), and alleges:

I.

That plaintiff, Maryland Casualty Company, is now and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized and licensed to do business in the State of California, and having its principal place of business within the State of [1*] California, in the City and County of San Francisco.

*Page numbering appearing at foot of page of original certified transcript of Record.

II.

That defendant Mazilla Tighe is a citizen of the State of California, and resides in the County of Alameda in said state; that defendant Ah Chong is a citizen and subject to the Republic of China, and resides in the City and County of San Francisco, in the State of California; that defendant Leong Cheung is a citizen of the State of California, and resides in the City and County of San Francisco in said state.

III.

That the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars (\$3,000.).

IV.

That this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, section 274d, 28 U. S. C. A. section 400).

V.

That on or about the 3rd day of April, 1937, plaintiff issued a policy of automobile insurance to defendant Ah Chong; that the policy period was from April 3, 1937, to April 3, 1938, and said policy was in effect during all of said period; that in said policy plaintiff agreed with defendant Ah Chong to pay on behalf of defendant Ah Chong, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums, not exceeding

\$5,000. for each person and not exceeding \$10,000. for each accident, which defendant Ah Chong should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance and use of a certain automobile described in said policy as a 1929 model Kleiber 1½ Ton Truck, M#16EC7717; that said policy further provided [2] that the purposes for which said automobile was to be used were commercial and that use of said automobile for said purposes included the loading and unloading thereof; that a true copy of said policy is attached hereto marked Exhibit "A" and the same hereby is made a part hereof.

VI.

That on or about the 25th day of January, 1938, defendant Mazilla Tighe commenced an action for damages against defendants Ah Chong and Leong Cheung in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants, and numbered therein No. 278962; that in the complaint of said Mazilla Tighe in said action said Mazilla Tighe alleged that on the 26th day of November, 1937, said Leong Cheung was an employee of said Ah Chong and, while so employed, said Leong Cheung made a delivery of vegetable prod-

uce to a restaurant known as Piccadilly Inn and located in the 300 block in Sutter Street in San Francisco, from a delivery truck parked at the curb on said Sutter Street and opposite to, and about ten feet from, the entrance of said Piccadilly Inn; that at said time and place said Mazilla Tighe was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilly Inn; that at said time and place said Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: that after making a delivery to the aforesaid Piccadilly Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder as he continued running forward, in a negligent and careless manner; that he ran toward the aforesaid [3] truck at the curb, and in so doing collided with said Mazilla Tighe as she walked along the aforesaid sidewalk, with such force and effect that said Mazilla Tighe was knocked violently to the sidewalk and was caused to sustain injuries as more particularly in said complaint appears; that as a result of said collision said Mazilla Tighe suffered injuries and loss of earning capacity, and incurred and will incur expense for medical and nursing attention, in the aggregate amount, to the date of filing said complaint, of \$10,390.; in said complaint said Mazilla Tighe prays for judgment against said Ah Chong

and Leong Cheung, and each of them, as follows: For general damages in the sum of \$10,000., for special damages incurred to date of filing said complaint in the sum of \$390., for such further special damages as may be incurred subsequent to the date of filing said complaint, for costs of suit, and for such other and further relief as to the Court may seem meet in the premises; that a true copy of said complaint is attached hereto, marked Exhibit "B", and the same hereby is made a part hereof.

VII.

That on or about the 31st day of January, 1938, defendant Ah Chong for the first time advised plaintiff that said action for damages had been commenced, and until so advised plaintiff had no information that such action had been commenced or that any accident previously had occurred as alleged in said complaint or in which said defendants Leong Cheung and Mazilla Tighe, or either of them, had been involved, or that any claim for damages had been or was being made by defendant Mazilla Tighe by reason thereof.

VIII.

That an actual controversy exists as between plaintiff and defendants herein, as follows: Defendants Ah Chong and Leong Cheung contend that since the automobile referred to in said [4] complaint in said action brought by said Mazilla Tighe is the same automobile described in said insurance policy plaintiff herein has the obligation under said

policy to defend said Ah Chong and Leong Cheung in said action; further, defendants Ah Chong, Leong Cheung and Mazilla Tighe contend that if it should be adjudged in said action that said Ah Chong and Leong Cheung have any liability to pay any sums to said Mazilla Tighe by reason of the alleged accident set forth in said complaint in said action, then plaintiff herein has the obligation under said policy to pay said sums to said Mazilla Tighe up to the aggregate amount of \$5,000.; on the other hand, plaintiff herein denies and controverts said contentions and each of them and on its part contends that although the automobile referred to in said complaint of said Mazilla Tighe is the same automobile described in said policy of insurance, plaintiff herein has no obligations or liability under said policy so far as said alleged accident is concerned because said alleged accident did not arise out of the use of said automobile or the loading or unloading thereof; further plaintiff herein contends that it was released of all obligations and liability under said policy so far as said accident is concerned by reason of the failure of defendant Ah Chong to notify plaintiff that any such accident occurred for more than sixty days after it is alleged in said complaint the same occurred.

IX.

That defendant Ah Chong has requested plaintiff herein to defend in the names and on behalf of defendants Ah Chong and Leong Cheung, said action brought by said Mazilla Tighe; that plaintiff herein

has consented to so defend said action, subject however to an express and complete reservation of all rights of plaintiff; that said action is now at issue. [5]

X.

That the continued defense of said action in said Superior Court by plaintiff herein will result in loss and damage to plaintiff by reason of the expenses that thereby will be incurred by plaintiff; that a declaratory judgment or decree herein determining the rights and other legal relations of the parties hereto is necessary to enable plaintiff herein properly to reach its decision respecting its continued defense of said action in said Superior Court, and to protect plaintiff if it should decide not to continue further with said defense, and to avoid the damages and loss that will result to plaintiff by reason of the accrual of expenses incident to the continuation of said defense; that the entry of a declaratory judgment or decree herein is necessary to avoid the loss and damages that will accrue to plaintiff in the event said action in said Superior Court should proceed to decision, and judgment should be entered therein for said Mazilla Tighe, since, in such event, unless a declaratory judgment or decree has been entered herein determining plaintiff herein has no liability under any judgment in said action in said Superior Court, plaintiff will be obliged to defend against the claims of defendants herein that plaintiff is liable to pay said judgment in said Superior Court action up to the aggregate amount of \$5,000.

XI.

That plaintiff is informed and believes and on such information and belief alleges that unless defendants herein are enjoined they will proceed with the trial of said action in said Superior Court; that unless a preliminary injunction is granted herein restraining defendants herein, and each of them, and their respective attorneys, from taking any further proceedings in said Superior Court action until this Court enters its final judgment or decree herein, said judgment or decree herein will be rendered [6] ineffectual in that plaintiff herein will be deprived of the benefit and protection of said judgment or decree so far as plaintiff's decision respecting the defense of said Superior Court action is concerned; that unless such preliminary injunction is so granted herein, plaintiff herein will suffer irreparable loss and damage in that plaintiff herein will have no right to recover the expenses, or any part of the expenses, plaintiff herein will incur by reason of the defense of said Superior Court action.

XII.

That plaintiff is informed and believes and on such information and belief alleges that unless defendants herein are enjoined they will proceed with the trial of said action in said Superior Court and if judgment is entered therein for said Mazilla Tighe, defendants herein will undertake to impose upon plaintiff herein liability for the payment of said judgment up to the aggregate amount of \$,5000;

that unless a preliminary injunction is granted herein restraining defendants herein, and each of them, and their respective attorneys, until this court enters its final judgment or decree herein, from taking any further proceedings in said Superior Court action, and from taking any proceedings for the purpose of imposing any liability upon plaintiff herein based upon any judgment that may be rendered for said Mazilla Tighe in said Superior Court action, plaintiff herein will suffer irreparable loss and damage in that plaintiff herein will be obliged to employ counsel to defend against said claim that plaintiff herein is liable to pay said judgment up to the aggregate amount of \$5,000. and plaintiff herein will have no right to recover the expenses that will be so incurred, or any part thereof; that the granting of such preliminary injunction is necessary to avoid multiplicity of judicial proceedings in that any proceedings to impose liability upon plaintiff herein based upon any judgment for said Mazilla [7] Tighe in said Superior Court action will present the same issues and questions as those presented by this suit for a declaratory judgment or decree; that if such injunction is not so granted and the claims of defendants herein that plaintiff herein is liable to pay any judgment for said Mazilla Tighe in said Superior Court action up to the aggregate amount of \$5,000. are adjudicated in favor of said claims, any judgment or decree that may be rendered herein for plaintiff herein will be rendered ineffectual.

Wherefore, plaintiff prays:

(a) That defendants and each of them be required to answer this bill of complaint in the nature of a petition for declaratory judgment.

(b) That this Court adjudge, decree and declare the rights and legal relations of the parties under and by reason of that certain policy of automobile insurance hereinabove referred to in order that such declaration have the force and effect of a final judgment and decree.

(c) That this Court adjudge and decree that plaintiff herein has no obligation under said policy of automobile insurance to defend defendants Ah Chong and Leong Cheung, or either of them, in that certain action hereinabove referred to, brought by defendant Mazilla Tighe in the Superior Court of the State of California, in and for the City and County of San Francisco.

(d) That this Court adjudge and decree that plaintiff herein has no liability under said policy of automobile insurance by reason of the alleged accident set forth in said complaint in said action brought by said Mazilla Tighe in said Superior Court, because said alleged accident did not arise out of use of said automobile described in and covered by said policy, and because of the failure of defendant Ah Chong to give plaintiff herein any notice [8] of said alleged accident for more than sixty days after said accident is alleged to have *incurred*.

(e) That this Court grant a preliminary injunction restraining the defendants herein, and each of

them, and their respective attorneys, until this Court enters its final judgment or decree herein, from taking any further proceedings in said action in said Superior Court, and from taking any proceedings for the purpose of imposing any liability upon plaintiff herein based upon any judgment that may be rendered for said Mazilla Tighe in said Superior Court action.

(f) For such other and further relief as may to the Court seem meet in the premises.

TREADWELL & LAUGHLIN

Attorneys for Plaintiff [9]

State of California,
City and County of San Francisco—ss.

Reginald S. Laughlin, being first duly sworn, says: I am one of the attorneys for plaintiff in this action. I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge, except as to matters stated therein on information and belief, and as to those matters I believe it to be true. The reason why this verification is not made by an officer of plaintiff corporation is that none of its officers are now within the State of California where I reside.

REGINALD S. LAUGHLIN

Subscribed and sworn to before me this 20th day of June, 1938.

[Seal]

LULU P. LOVELAND

Notary Public in and for the City and County of
San Francisco, State of California [10]

EXHIBIT "A"
AUTOMOBILE POLICY

Maryland Casualty Company
Baltimore

DECLARATIONS

Item 1. Name of Insured—Ah Chong
Address—128 Oregon Street, San Francisco,
No. Street County Town
California
State

The automobile will be principally garaged and used in the above town, county and state, unless otherwise specified herein.

The occupation of the named insured is Fruit and Vegetable Peddler

(If married woman, give husband's occupation or business)

Item 2. Policy Period: From April 3rd, 1937 to April 3rd, 1938 12.01 A. M., Standard Time at the address of the named insured as stated herein.

Item 3. The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto.

The purposes for which the automobile is to be used are Commercial.

COVERAGES		LIMITS OF LIABILITY	
A—Bodily Injury Liability	\$5,000.00	each person	
		and subject to that limit for each person	
	\$10,000.00	each accident	
B—Property Damage Liability	\$	each accident	
Description of the automobile and facts respecting its purchase by the named insured			
			Premiums
			Coverage A. Coverage B.
			Bodily Injury Property Damage
			Liability Liability
Trade Name	Model	Serial No. (S)	List Price and
	Year	and	Date Purchased.
		Motor No. (M)	New or Used.
Kleiber	1929	M#16EC7717	\$45.00
		1½ Ton	\$17.00
		Truck	
			Totals
			\$5.00
Special charge for Drive Other Car coverage as per endorsement attached, if any			\$
Special charge for			\$
			as per endorsement attached
Total Premium			\$62.00

The word "none" in the premium columns below shall mean that no insurance is afforded under the respective coverages.

(a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named insured's business occupation as expressed in Item 1. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

The nationality and color (state both) of the named insured are Chinese—Oriental.

The risk was insured during the past year in Maryland.

The named insured is the sole owner of the automobile, except as herein stated: No Exceptions.

No insurer has cancelled any automobile insurance issued to the named insured during the past year, except as herein stated: No Exceptions.

Countersigned this 3rd day of April, 1937.

By.....

Authorized Representative.

[11]

Policy No. 15—537989

Maryland Casualty Company
(A stock insurance company, herein called
the company)

Does hereby agree with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the declarations and subject to the

limits of liability, exclusions, conditions and other terms of this policy:

Insuring Agreements

I

Coverage A—Bodily Injury Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage B—Property Damage Liability

To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

II

Defense, Settlement, Supplementary Payments. It is further agreed that as respects insurance afforded by this policy under coverages A and B the company shall

(a) defend in his name and behalf any suit against the insured alleging such injury or de-

struction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the company;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the insured in any such suit, all expenses incurred by the company, all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon, and any expense incurred by the insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

The company agrees to pay the expenses incurred under divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy.

III

Automatic Insurance for Newly Acquired Automobiles

If the named insured who is the owner of the automobile acquires ownership of another automo-

bile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: (1) if the company insures all automobiles owned by the named insured at the date of such delivery, insurance applies to such other automobile, if it is used for pleasure purposes or in the business of the named insured as expressed in the declarations, but only to the extent applicable to all such previously owned automobiles; (2) if the company does not insure all automobiles owned by the named insured at the date of such delivery, insurance applies to such other automobile, if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery; and (4) this agreement does not apply (a) to any loss against which the named insured has other valid and collectible insurance, nor (b) unless the named insured notifies the company within ten days following the date of delivery of such other automobile, nor (c) except during the policy period, but if the date of delivery of such other automobile is prior to the effective date of this policy the insurance applies as of the effective date of this policy, nor (d) unless the named insured pays any additional premium required because of the application of this insurance to such other automobile.

IV

Definition of "Insured."

The unqualified word "insured" wherever used in coverages A and B and in other parts of this policy, when applicable to these coverages, includes not only the named insured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the automobile is "pleasure and business" or "commercial", each as defined herein, and provided further that the actual use is with the permission of the named insured. The provisions of this paragraph do not apply:

(a) to any person or organization with respect to any loss against which he has other valid and collectible insurance;

(b) to any person or organization with respect to bodily injury to or death of any person who is a named insured;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of the operation thereof;

(d) to any employee of an insured with respect to any action brought against said employee because of bodily injury to or death of another employee of the same insured injured in the course of such employment in an accident

arising out of the maintenance or use of the automobile in the business of such insured.

V.

Policy Period, Territory, Purposes of Use

This policy applies only to accidents which occur during the policy period, while the automobile is within the United States in North America (exclusive of Alaska) or the Dominion of Canada, or while on a coastwise vessel between ports within said territory, and is owned, maintained and used for the purposes stated as applicable thereto in the declarations.

Exclusions

This policy does not apply:

(a) while the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented under contract or leased, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) while the automobile is used for the towing of any trailer not covered by like insurance in the company; or while any trailer covered by this policy is used with any automobile not covered by like insurance in the company;

(c) while the automobile is operated by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person or to his occupation, or by any person in any pre-arranged race or competitive speed test;

(d) to any liability assumed by the insured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named insured in the automobile, without the written consent of the company;

(e) under coverage A, to bodily injury to or death of any employee of the insured while engaged in the business of the insured, other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which the insured may be held liable under any workmen's compensation law;

(f) under coverage B, to property owned by, rented to, leased to, in charge of, or transported by the insured.

Conditions

1. **Automobile Defined.** Two or More Automobiles. Except where specifically stated to the contrary, the word "automobile" wherever used in this policy shall mean the motor vehicle, trailer or semi-trailer described herein; and the word "trailer" shall include semi-trailer. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

2. **Limits of Liability.** Coverage A. The limit of bodily injury liability expressed in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of

bodily injury to or death of one person in any one accident; the limit of such liability expressed in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of two or more persons in any one accident.

3. **Limits of Liability.** Coverages A and B. The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

4. **Financial Responsibility Laws.** Any insurance provided by this policy for bodily injury liability or property damage liability shall conform to the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising from the use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company on account of any accident, claim or suit, involving a breach of the terms of this policy and for any payment the company would not have been obligated to make under the provisions of this policy except for the agreement contained in this paragraph.

5. **Notice of Accident.—Claim or Suit.** Upon the occurrence of an accident written notice shall

be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

6. Assistance and Cooperation of the Insured. The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits and the company shall reimburse the insured for any expense, other than loss of earnings, incurred at the company's request. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

7. Action Against Company. No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the conditions hereof, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against

the insured after actual trial or by written agreement of the insured, the claimant, and the company, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the insured. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured shall not relieve the company of any of its obligations hereunder.

8. Other Insurance. If the named insured has other insurance against a loss covered by this policy, the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability expressed in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

9. Subrogation. In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor and the insured shall execute all papers required and shall do everything that may be necessary to secure such rights.

10. Changes. No notice to any agent, or knowledge possessed by any agent or by any other person

shall be held to effect a waiver or change in any part of this policy nor estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the President, a Vice-President, the Secretary or an Assistant Secretary of the company, and countersigned by an authorized representative of the company.

11. Assignment. No assignment of interest under this policy shall bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within thirty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) subject otherwise to the provisions of Insuring Agreement IV, any person having proper temporary custody of the automobile, as an insured, until the appointment and qualification of such legal representative, but in no event for a period of more than thirty days after the date of such death or adjudication.

12. Cancellation. This policy may be canceled by the named insured by mailing written notice to the company stating when thereafter such cancellation shall be effective, in which case the company shall, upon demand, refund the excess of premium paid by such insured above the customary short rate

premium for the expired term. This policy may be canceled by the company by mailing written notice to the named insured at the address shown in this policy stating when not less than five days thereafter such cancelation shall be effective, and upon demand the company shall refund the excess of premium paid by such insured above the pro rata premium for the expired term. The mailing of notice as aforesaid shall be sufficient proof of notice and the insurance under this policy as aforesaid shall end on the effective date and hour of cancelation stated in the notice. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing. The company's check or the check of its representative similarly mailed or delivered shall be a sufficient tender of any refund of premium due to the named insured. If required by statute in the state where this policy is issued, refund of premium due to the named insured shall be tendered with notice of cancelation when the policy is canceled by the company and refund of premium due to the named insured shall be made upon computation thereof when the policy is canceled by the named insured.

13. *Declarations.* By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, the Maryland Casualty Company has caused this policy to be signed by its president and secretary at Baltimore, Maryland, and countersigned on the declarations page by a duly authorized representative of the company.

SILLIMAN EVANS,

President

JNO. A. HARTMAN

Secretary [12]

Endorsement

#1

(Which shall only be effective on and after
date hereof)

Date April 3rd, 1937

In consideration of the premium at which this Policy is written, it is hereby understood and agreed that the Assureds business is exclusively retail and that the regular and frequent use of the commercial automobiles covered by this Policy is and will be confined during the Policy period to the territory within a 25 mile radius of the place of principal garaging of such automobiles that no regular or frequent trips are or will be made during the Policy period to any location beyond a 25 mile radius from the place of principal garaging of such automobiles.

Nothing herein contained shall be held to vary, alter, waive, or extend any of the terms, limits or conditions of the Policy, except as hereinabove set forth.

This endorsement forms a part of Policy No. 15-537989 issued to Ah Chong.

MARYLAND CASUALTY
COMPANY
SILLIMAN EVANS,
President

Countersigned

.....
Authorized Representative

A Stock Company
AUTOMOBILE POLICY
No. 15—.....
Maryland Casualty Company

Issued to—

Premium, \$.....

Expires.....19.....

Please Read Your Policy

Carefully note conditions requiring immediate notice of every accident and of every suit.

SPECIAL SERVICE FOR
MARYLAND POLICYHOLDERS

The Service Card delivered with this policy should be carried with you at all times. In case of an accident it is your guarantee of indispensable service in time of trouble.

The Service Card enables you to secure a release of attachment bond or a bail bond with the least

possible delay or trouble and is your introduction to the thousands of Maryland Agents at your command.

The Maryland Casualty Company issues all forms of casualty insurance and surety bonds in the United States, Alaska, Hawaii, Puerto Rico, Canada, Canal Zone, Cuba. Agents everywhere.

EXHIBIT "B"

In the Superior Court of the State of California
in and for the City and County of San
Francisco

No. 278962

MAZILLA TIGHE

Plaintiff,

vs.

AD CHONG, LEONG CHEUNG, John Doe, Richard Roe, Black and White Company, a corporation,

Defendants.

COMPLAINT FOR DAMAGES

Plaintiff above named complains of the defendants above named, and each of them, and for cause of action alleges as follows:

I.

That plaintiff is ignorant of the true names of the defendants John Doe, Richard Roe, Black and White Company, a corporation, and for that reason they are sued herein under said names as fictitious names, and plaintiff prays that when the true names of these defendants are ascertained, that they may be inserted herein, and in all subsequent proceedings in said action, and that the said action may then proceed against them under their true names.

II.

That at all times herein mentioned the defendant Ad Chong [13] was, and now is, engaged in the wholesale produce business and carries on said business in the City and County of San Francisco; that the office of said business is located at No. 128 Oregon Street in said city and county; that at all times herein mentioned Leong Cheung was an employee, agent and servant of Ad Chong and was acting within the scope and course of his said employment.

III.

That on the 26th day of November, 1937, the defendant Leong Cheung was an employee, agent and servant of his co-defendant Ad Chong, and was by him regularly employed to distribute and deliver vegetable produce, and in the performance of said employment said defendant Leong Cheung was required to, and he did, operate and drive a certain delivery truck for the purpose of making deliveries

of produce to various retail trade in said City and County of San Francisco; that said deliveries were made by said Leong Cheung by carrying vegetable produce from the said truck to various patrons of his employer, Ad Chong.

IV.

That at all times herein mentioned Sutter Street was and now is a public street in the City and County of San Francisco, California; that said street runs in a general easterly and westerly direction; that on said street, and in the block numbered "300", a restaurant is located known as the "Piccadilli Inn"; that plaintiff herein is informed and believes, and upon such information and belief alleges the fact to be, that at times herein mentioned the aforesaid Piccadilli Inn was a customer of said Ad Chong and customarily and at intervals receives produce vegetables from said Ad Chong, and by and through the delivery thereof by Leong Cheung.

V.

That on or about the 26th day of November, 1937, and in the morning thereof at approximately 8:34 A. M., defendant Leong Cheung [14] was making a delivery of produce vegetables to the said Piccadilli Inn, and that at said time and place he had left his aforesaid delivery truck standing parked at the curb and opposite to, and about ten feet from, the entrance of said Piccadilli Inn.

That at said time and place the plaintiff herein was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilli Inn; that at said time and place defendant Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: That after making a delivery to the aforesaid Piccadilli Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder as he continued running forward, in a negligent and careless manner; that he ran toward the aforementioned truck at the curb, and in so doing collided with the plaintiff herein as she walked along the aforesaid sidewalk, with such force and effect that plaintiff was knocked violently to the sidewalk and was caused to sustain injuries as more particularly hereinafter appears.

VI.

That as a direct and proximate cause of said collision and the negligence of the defendants, plaintiff Mazilla Tighe suffered and received the following injuries, to-wit, a broken scapula bone, wrenched and displaced shoulder blade, and as a result thereof plaintiff will be totally disabled for one year and more, and plaintiff will always suffer disability from said injuries; that in addition thereto plaintiff suffered severe bruises and sprains of her

lower back, and was bruised, wounded and contused generally over her body and suffered, and is suffering therefrom, great physical and nervous shock, and she is now and for the remainder of her life will be maimed, disabled and lame. [15]

VII.

That as a direct result of said injuries the plaintiff has suffered permanent loss and impairment of her health, and as a direct result of the defendants' negligence and plaintiff's bodily injuries caused thereby as aforesaid, and the consequent pain, anxiety, mental anguish, grief, mortification, physical suffering, loss of earning capacity, and the general damages which the plaintiff has suffered and will continue to suffer by reason of her said injuries, plaintiff has been and is generally damaged in the sum of Ten Thousand (\$10,000.00) Dollars.

VIII.

That plaintiff herein was at the time of said accident and had for a period of some years prior to the accident, been regularly employed in a department store in said City and County of San Francisco, and had been earning the approximate sum of Eighty-Five (\$85.00) Dollars per month; that as a direct and proximate result of said injuries as aforesaid plaintiff herein has lost two months' employment and has been specially damaged to date in the sum of One Hundred and Seventy (\$170.00) Dollars; that plaintiff will be further damaged in

this respect in an amount which she cannot at this time determine and she prays that when the full extent of her damage is ascertained, that this complaint may be amended to provide for same.

IX.

That as a direct and proximate result of said collision, and the injuries and negligence of said defendants, it was necessary for plaintiff to, and she did, retail the services of physicians and surgeons to treat the injuries sustained by her as aforesaid, and it will be necessary for the plaintiff to receive further medical attention for a period of time which cannot at the date of filing this complaint be definitely [16] ascertained; that to date plaintiff has incurred an indebtedness for the reasonable value of the necessary services rendered to her by said physicians and surgeons in the amount of One Hundred (\$100.00) Dollars; that plaintiff will incur a further indebtedness for the reasonable value of the necessary services to be rendered said plaintiff by said physician and surgeons in the future in an amount which cannot at this time be definitely ascertained and plaintiff prays that when the extent of the loss sustained by her in this respect is definitely ascertained, that this complaint may be amended and the same set forth herein; that by reason of the foregoing, and as a direct and proximate result of said collision and injuries and the negligence of defendants, it becomes necessary for the plaintiff herein to retain the services of a

practical nurse for her care; that the reasonable expense of said services is Sixty (\$60.00) Dollars per month and plaintiff has incurred an indebtedness in the sum of One Hundred and Twenty (\$120.00) Dollars in this regard to date, and will incur special damages in this respect in the future in an amount which cannot now be definitely ascertained and plaintiff prays that when the extent of the loss sustained by her in this respect is so definitely ascertained, that this complaint may be amended and the same set forth.

Wherefore, plaintiff prays judgment against said defendants, and each of them, as follows: For general damages in the sum of Ten Thousand (\$10,000.00) Dollars, for special damages incurred to date in the sum of Three Hundred and Ninety (\$390.00) Dollars, for such further special damages as may be incurred in the future, for plaintiff's costs of suit herein, and for such other and further relief as to the court may seem meet in the premises.

.....
Attorneys for Plaintiff [17]

State of California,
County of Alameda—ss.

Mazilla Tighe, being first duly sworn, deposes and says: That she is the plaintiff in the above entitled action; that she has read the foregoing complaint and knows the contents thereof; that the same is true of her own knowledge, except as to the matters which are therein stated upon information or belief,

and as to those matters, that she believes them to be true.

MAZILLA TIGHE

Subscribed and sworn to before me this 25th day of January, 1938.

RUPERT R. RYAN

Notary Public in and for the County of Alameda, State of California.

[Endorsed]: Filed June 20, 1938. [18]

[Title of District Court and Cause.]

TEMPORARY INJUNCTION

This cause came on regularly to be heard at this term upon the motion of plaintiff in said cause for a temporary injunction, upon plaintiff's verified bill of complaint and upon the motion to dismiss of defendant Mazilla Tighe, and the matter having been argued by counsel for the parties, and it appearing that the issuance of a temporary injunction is necessary to prevent irreparable loss and damage to plaintiff herein and to prevent impairment of the exercise of the court's jurisdiction herein or the enforcement of its orders:

It Hereby Is Ordered, Adjudged and Decreed that a temporary injunction be, and the same hereby is granted plaintiff against the [19] defendants above named, and their respective agents, servants and attorneys, and anyone acting by, through or

for them, restraining them, and each of them, from taking any further proceedings in that certain action pending in the Superior Court of the State of California in and for the City and County of San Francisco, entitled "Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants", and numbered therein No. 278962, and from taking any proceedings for the purpose of imposing any liability upon plaintiff herein based upon any judgment that may be rendered in said Superior Court action.

It Is Further Ordered that this temporary injunction remain in full force and effect until final hearing and determination of this cause and until further order of this court.

Dated: July 2, 1938.

(Signed) WALTER C. LINDLEY

District Judge.

[Endorsed]: Filed July 2, 1938. [20]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS AH CHONG
AND LEONG CHEUNG

Come now the defendants Ah Chong and Leong Cheung and for their answer to the complaint say:

I.

Admit that the plaintiff is now and at all times mentioned in the complaint was a corporation or-

ganized and existing by virtue of the laws of the State of Maryland and licensed to do business in the State of California with principal place of business at San Francisco.

II.

Admit that defendant Ah Chong is a citizen and subject of the Republic of China; admit that defendant Leong Cheung is a citizen of the State of California; admit that both said Ah Chong and said Leong Cheung reside in the City and County of San Francisco, State of California. These answering defendants have no knowledge as to the citizenship or residence of the defendant Mazilla Tighe.

III.

Admit that the amount in controversy herein exclusive of interest and costs, exceeds the sum of three thousand dollars (\$3,000).

IV.

Admit that this suit purports to be brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A. Section 400), but deny that said suit presents or involves issues properly coming within the terms of or subject to the provisions of said act. [21]

V.

Admit that on or about the 3d day of April, 1937, plaintiff issued a policy of automobile liability insurance to defendant Ah Chong; that the policy

period was from April 3, 1937, to April 3, 1938; admit that said policy was in effect during all of said period; that in said policy plaintiff agreed with defendant Ah Chong to pay on behalf of defendant Ah Chong, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums, not exceeding \$5000 for each person and not exceeding \$10,000 for each accident, which said defendant Ah Chong should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury sustained by any person or persons, caused by accident and arising out of the ownership, maintenance and use of a certain automobile described in said policy as a 1929 Model Kleiber 1½ Ton Truck M#16EC7717; that said policy further provided that the purposes for which said automobile was to be used were commercial and that use of said automobile for said purposes included the loading and unloading thereof; and that to the best of the knowledge and belief of these answering defendants the copy attached to said complaint and marked Exhibit "A" is a true copy of said policy.

VI.

Admit that on or about the 25th day of January, 1938, defendant Mazilla Tighe commenced an action for damages against these answering defendants in the Superior Court of the State of California, in and for the City and County of San Francisco,

entitled Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, [22] Black and White Company, a corporation, Defendants, and numbered therein No. 278,962; admit that the allegations of the complaint in said action are correctly stated in Paragraph VI of Plaintiff's complaint herein; that to the best knowledge and belief of these answering defendants the copy of the complaint in said action No. 278,962 attached to the complaint herein and marked Exhibit "B" is a true copy thereof.

VII.

Answering the allegations contained in Paragraph VII of plaintiff's complaint herein, these answering defendants admit that on or about the 31st day of January, 1938, defendant Ah Chong for the first time advised plaintiff that said action for damages had been commenced. These answering defendants have no knowledge whether, until so advised, plaintiff had or had not any information that the said action of Mazilla Tighe had been commenced; admit that neither these answering defendants nor either of them previous to the 31st day of January, 1938, notified plaintiff that they, or either of them, had been involved in the accident described in the complaint of Mazilla Tighe now on file in said action No. 278,962, as aforesaid. That the reason these answering defendants did not so notify plaintiff was that though the automobile of defendant Ah Chong insured by plaintiff as set forth in Para-

graph V of its complaint herein, was parked for unloading in front of the aforesaid Piccadilly Inn early in the forenoon of the 26th day of November, 1937, neither these answering defendants, nor either of them, or their servants, employee or agents, were involved in any accident to the said Mazilla Tighe in front of said Piccadilly Inn on the said 26th day of November, 1937, or involved in any accident to the said Mazilla Tighe [23] at any other time or place, or at all, and therefore these answering defendants under the terms of said policy of automobile liability insurance had nothing to report to plaintiff prior to the time these answering defendants were served with summons and copy of complaint in said action No. 278,962, begun by said Mazilla Tighe in the Superior Court of the State of California, in and for the City and County of San Francisco on or about the 25th day of January, 1938; that the said summons and complaint in said action No. 278,962 were forwarded to the plaintiff by defendant Ah Chong immediately after service and were received by plaintiff on the 31st day of January, 1938; that prior to service of said summons no claims were made upon these answering defendants by or on behalf of the said Mazilla Tighe.

VIII.

Answering the allegations of Paragraph VIII of plaintiff's complaint, defendants Ah Chong and Leong Cheung admit that they contend that since the automobile referred to in said complaint in said

action brought by said Mazilla Tighe is the same automobile described in said insurance policy, plaintiff herein has an obligation under said policy to defend these answering defendants in said action; these answering defendants further admit that should it be adjudged in said action that they have any liability to pay any sums to said Mazilla Tighe by reason of the alleged accident set forth in said complaint in said action, then plaintiff has the obligation under said policy to pay said sums to said Mazilla Tighe up to the aggregate amount of \$5000; that said contention of these answering defendants is based upon the terms of said automobile liability insurance policy, and particularly upon those provisions reading as [24] follows: (1) "Use of the automobile for the purposes stated includes the loading and unloading thereof" (page 1 of the policy); (2) Paragraph I, page 2, of the policy, covering liability "arising out of the ownership, maintenance or use of the automobile"; (3) Sub-division (a), Paragraph II of the policy (in part), wherein plaintiff agrees to "defend in his name and behalf any suit against the insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent," and (4) Paragraph IV of the policy, and especially so much thereof as defines the unqualified word "insured" as including "not only the named insured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided that

the declared and actual use of the automobile is 'pleasure and business' or 'commercial,' each as defined herein, and provided further that the actual use is with the permission of the named assured"; in this behalf these answering defendants allege that said automobile was used for commercial purposes at all time during the 26th day of November, 1937, and during all times on said day its actual use by the defendant Leong Cheung was with the permission of the named insured, defendant Ah Chong; that, notwithstanding its allegations to the contrary, plaintiff has both obligation and liability under said policy to these answering defendants and to each of them; that said action in the San Francisco Superior Court did in fact arise out of the operation, maintenance and use of the said insured automobile, and that these answering defendants cannot rightfully be charged with violation of the terms of said policy in failing to report said accident for more than 60 days after its occurrence inasmuch as neither of them, nor their servants, employees or [25] agents were involved therein; deny that plaintiff was prejudiced by said delay, whatever its cause.

IX.

Answering Paragraph IX of the complaint defendants admit that defendant Ah Chong has requested plaintiff herein to defend in the names and on behalf of defendants Ah Chong and Leong Cheung said action brought by said Mazilla Tighe; that plaintiff herein has consented to so defend said

action; deny that such consent is subject to any reservation of rights whatsoever as to the defendant Leong Cheung, and as to the defendant Ah Chong is subject only to such purported reservation of rights as has been effected by a certain letter from plaintiff to defendant Ah Chong dated March 7, 1938, a copy of which is attached hereto marked "Exhibit 1," and made a part hereof.

X.

Answering the allegations contained in Paragraph X of the complaint herein, defendants Ah Chong and Leong Cheung deny that the continued defense of the Superior Court action by plaintiff will result in any loss or damage to plaintiff; deny that plaintiff is entitled to a declaratory judgment, or any judgment herein, because of the matters set forth in said Paragraph X of plaintiff's said complaint.

XI.

Answering the allegations contained in Paragraph XI of the complaint, defendants Ah Chong and Leong Cheung allege that plaintiff herein is not entitled to the benefit or protection of any decree of this court, or of any court, relieving plaintiff from liability under the terms, conditions, limitations and restrictions of said policy of automobile liability insurance. [26]

XII.

Answering the allegations contained in Paragraph XII of the complaint, defendants Ah Chong

and Leong Cheung admit that if judgment is entered against them in the Superior Court action wherein Mazilla Tighe is plaintiff, these answering defendants will undertake to impose upon plaintiff herein liability for the payment of said judgment within the limit of the coverage of said policy of automobile liability insurance; deny that plaintiff is entitled to a preliminary injunction, or to any injunction, restraining these answering defendants from taking any proceedings for the purpose of imposing liability upon plaintiff herein based upon any judgment that may be rendered for said Mazilla Tighe in said Superior Court action; these answering defendants further allege that plaintiff has already accepted and undertaken the defense of said action on behalf of defendants Ah Chong and Leong Cheung and has brought it to issue, and that plaintiff is bound by its conduct and the terms of said policy of automobile liability insurance to continue said defense to a final termination, and within the limits and condition of the said policy to pay any judgment that may be rendered for Mazilla Tighe against these answering defendants, if any, or to settle said claim of Mazilla Tighe against these answering defendants.

Wherefore, defendants Ah Chong and Leong Cheung pray that this court deny the prayer of plaintiff herein for a declaratory judgment, that this suit be dismissed, and that the defendants Ah Chong and Leong Cheung have judgment for their

costs incurred herein and for such other relief as may be meet and proper in the premises.

CHARLES B. MORRIS

Attorney for Defendants Ah
Chong and Leong Cheung.

[27]

DEFENDANTS' EXHIBIT No. 1

Maryland Casualty Company
Silliman Evans, Chairman of the Board
Edward J. Bond, Jr., President

San Francisco Claim Division
210 Sansome Street, San Francisco, Calif.

Geo. W. Ecrement, Jr., Mgr.
Donald Seibert, Attorney

58848-0-38-Auto
Ah Chong
BI-Mazilla Tighe

March 7, 1938

Mr. Ah Chong
128 Oregon Street
San Francisco, California

Dear Sir:

We have heretofore received from you a copy of Summons and Complaint, served upon you in an action commenced against you and your employee, Leong Chong, by Mazilla Tighe, in the Superior Court of the State of California, in and for the City and County of San Francisco, to recover damages in the sum of \$10,390.00, and costs, for personal in-

juries alleged to have been sustained by the said Mazilla Tighe, as a result of an accident which occurred on or about November 26, 1937. We have accepted the defense of this action under a complete reservation of our rights, because of late notice to us of the accident, and for the other reasons herein stated.

It appears that the accident in question occurred on or about November 26, 1937, but we were not notified of same until at least January 31, 1938, and as a result we have been prejudiced in any handling of this matter.

As you are familiar, our policy, #15-537989 covers automobile accidents, and it appears that the accident in question is not such an accident as contemplated by the policy, as it does not appear that the injuries claimed by the claimant were sustained as a result of the operation of your automobile.

It is also to be noted that whereas damages sought by the plaintiff are in the sum of \$10,390.00, plus costs, our liability under the terms of the policy above-mentioned is limited to the sum of \$5,000.00. In the event that it appears that this company is liable under the terms of the policy, such liability, of course, is limited to the sum of \$5,000.00, and any part of a judgment which might be rendered in the pending suit in excess of that sum will, therefore, have to be paid by you. [28]

We are appearing in this case on your behalf through our attorney, Donald Seibert, of 210 Sansome Street, San Francisco, who will represent you

at the trial and defend the action without expense to yourself; but we are writing you at this time to advise you that, in view of your excess interest above-mentioned, you may, if you so desire, associate your own attorney with ours in the defense of the suit, it being understood, of course, that this will be done at your own expense.

We kindly request you to acknowledge receipt of this letter on the enclosed carbon copy thereof, which we ask you to return to this office as soon as possible.

Very truly yours,

GEO. W. ECREMENT, JR.,

Mgr.

per (signed) EARL C. BERGER

Adjuster

ECB:MM

Receipt of copy of the within Answer of defendants Ah Chong and Leong Cheung with Exhibit 1 is hereby admitted this 14th day of July, 1938.

TREADWELL & LAUGHLIN

Attorneys for Plaintiff.

[Endorsed]: Filed Jul. 15, 1938. [29]

[Title of District Court and Cause.]

ANSWER BY DEFENDANT MAZILLA TIGHE
TO COMPLAINT FOR DECLARATORY
RELIEF.

Comes now the above named defendant Mazilla Tighe, and answers the plaintiff's complaint for declaratory relief on file herein, as follows:

I.

Defendant Mazilla Tighe answering Paragraph I of the complaint herein, states that she has no information or belief sufficient to enable her to answer any or either of the allegations contained in said paragraph, and basing her denial on that ground, denies each and several the allegations contained in said paragraph.

II.

Answering Paragraph II of plaintiff's complaint on file herein, this defendant admits she is a citizen of the State of California and resides in the County of Alameda in said state, as set forth in said paragraph; denies each and every allegation and statement therein contained and not herein specifically admitted to be true.

III.

That defendant herein admits all of the allegations contained in Paragraph III and IV of plaintiff's complaint on file herein.

IV.

That defendant herein, answering Paragraph V of plaintiff's complaint on file herein, admits all the allegations contained in said paragraph.

V.

That defendant herein, answering Paragraph VI of plaintiff's complaint on file herein, admits all the allegations contained in said paragraph. [30]

VI.

That defendant, answering the allegations set forth in Paragraph VII of plaintiff's complaint herein, states that she has no information or belief sufficient to enable her to answer any or either of the allegations contained in said paragraph, and basing her denial on this ground, denies each and several the allegations contained in said Paragraph VII.

VII.

That defendant herein, answering Paragraph VIII of plaintiff's complaint on file herein, specifically denies that an actual controversy exists as between plaintiff and defendant herein based upon the allegations therein set forth in said paragraph contained, and beginning on line 29, page 4, to and including, and ending with the words "or unloading thereof" on line 18, page 5 of plaintiff's complaint. Defendant herein answering the remaining allegations of said paragraph, states that she has no information or belief sufficient to enable her to

answer the said allegations contained, and basing her denial on that ground, denies each and several the allegations contained in said paragraph.

VIII.

Answering Paragraph IX of plaintiff's complaint on file herein, defendant admits that the action by defendant herein against Ah Chong and Leong Cheung is now at issue as set forth in said paragraph, and further answering said paragraph, defendant herein having no information or belief upon the allegations set forth in Paragraph IX of plaintiff's complaint on file herein sufficient to enable her to answer, bases her denial on that ground and denies each and every allegations set forth in said paragraph not herein specifically admitted to be true. [31]

IX.

That defendant denies each and every allegation set forth in Paragraph X of plaintiff's complaint on file herein.

X.

Answering Paragraph XI of plaintiff's complaint on file herein, defendant herein admits that the action now pending in the State Court will go to trial in the Superior Court of the State of California, in and for the City and County of San Francisco, and further answering said paragraph, specifically denies that the refusal of this Court to order a preliminary injunction restraining all the parties in the action now pending in the State Court

as hereinbefore mentioned will render any judgment or decree by this Court for declaratory relief ineffectual, and further answering Paragraph XI of plaintiff's complaint on file herein, defendant specifically denies that plaintiff herein will suffer irreparable loss and damage, or any loss or any damage whatever.

XI.

Answering Paragraph XII of plaintiff's complaint on file herein, defendant admits that she will proceed with the trial of the action now pending in the Superior Court of California, in and for the City and County of San Francisco, and further answering said paragraph, denies each and every allegation and statement therein contained not herein specifically admitted to be true.

And As a Further, Separate and Distinct Answer and Defense, defendant herein alleges as follows:

I.

That on the 25th day of January, 1938, Mazilla Tighe, [32] defendant herein, commenced an action for damages against Ah Chong, Leong Cheung, Black and White Company, a corporation, defendants, and numbered therein No. 278962.

II.

That said action was and now is pending in a court of the State of California and is ready for

trial. That the said action is predicated upon certain personal injuries received by defendant herein through the negligence and carelessness of Leong Cheung and Ah Chong, and that said cause of action in favor of defendant herein arose in the City and County of San Francisco.

Therefore, at all times herein mentioned the Superior Court of the State of California, in and for the City and County of San Francisco has jurisdiction over the subject matter of the action now pending in said state court, and that the United States District Court, in and for the Northern District of California, Southern Division, never had or acquired jurisdiction over the subject matter of said action in the State Court. That the said United States Court having no jurisdiction, or having never acquired jurisdiction over the subject matter hereof, has no jurisdiction to issue any restraining order or preliminary injunction enjoining the proceedings of said action as hereinbefore mentioned now pending in the State Court.

Wherefore, defendant herein prays that plaintiff take nothing by its said complaint and that the temporary injunction issued herein be recalled; that the defendant be hence dismissed and have judgment for her costs herein incurred.

YOUNG & RYAN

Attorneys for Defendant

Mazilla Tighe [33]

State of California
County of Alameda—ss.

Rupert R. Ryan, being first duly sworn, deposes and says:

I am one of the attorneys for plaintiff in this action. I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge, except as to matters stated therein on information and belief, and as to those matters, I believe it to be true. The reason why this verification is not made by Mazilla Tighe is that she is out of the county where I reside.

RUPERT R. RYAN

Subscribed and sworn to before me this 23rd day of July, 1938.

[Notarial Seal] JOSEPH J. Y. YOUNG
Notary Public in and for the County of Alameda,
State of California.

[Endorsed]: Filed Jul. 23, 1938. [34]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

A pre-trial conference having been held this day, it was agreed by counsel that the issues were as follows:

1. Whether the alleged injury was one within the terms of the policy. This to be determined upon the face of the policy and the allegations of the pleadings.

2. Whether or not the plaintiff was released from liability by reason of failure of the insured to give notice of the accident in accordance with the terms of the policy.

3. Whether or not plaintiff has waived its right to claim that the injury was not within the terms of the policy or to claim a release by failure of insured to give notice in accordance with the terms of the policy. In this connection it was stipulated that the letter attached to defendant's answer might be read in evidence without further proof.

4. An issue was raised by one of the answers as to the incorporation of the plaintiff and the authority of the corporation to do business in California, as alleged in the complaint, but this issue was withdrawn by the defendant Tighe.

5. Defendant Tighe gave notice that on the trial she would raise the question as to the jurisdiction of the court, to stay proceedings in the state court.

Done in Open Court this 20th day of March, 1939.

A. F. ST. SURE

Judge.

The foregoing Order is hereby approved.

TREADWELL & LAUGHLIN

Attorneys for Plaintiff

CHARLES B. MORRIS

Attorney for Defendants

Ah Chong and Leong Cheung

YOUNG & RYAN

Attorneys for Defendant

Mazilla Tighe.

[Endorsed]: Filed Mar. 25, 1939. [35]

[Title of District Court and Cause.]

OPINION

St. Sure, District Judge.

Plaintiff, alleging diversity of citizenship, invokes the Federal declaratory judgment act (28 USCA 400) to have its rights determined under an automobile policy of insurance issued to defendant Ah Chong.

Defendant Mazilla Tighe brought an action in the state court against defendants Ah Chong and Leong Cheung for damages for personal injuries resulting from a collision with her while she was walking along a sidewalk in Sutter Street, San Francisco. Plaintiff had issued a policy of insurance to defendant Ah Chong, a fruit and vegetable peddler, insuring against bodily injury liability and property damage "arising out of the ownership, maintenance or use of the automobile," "including the loading and unloading thereof." (Quoted language from policy). While the action was pending in the state court, plaintiff brought this suit seeking a declaratory judgment and a preliminary injunction staying the prosecution of the action in the state court. Plaintiff asks this court to declare the rights and legal relations of the parties, and that it decree that plaintiff is under no obligation to defend the action in the state court and not liable under said policy for Mazilla Tighe's injuries. On June 30, 1938, District Judge Walter C. Lindley, presiding, overruled a demurrer to the complaint and allowed a temporary injunction. 24 F. Supp. 49.

Thereafter trial was had upon the merits, and the questions for decision are (1) whether the District Court has jurisdiction under the declaratory relief act to entertain a suit against defendant Mazilla Tighe; (2) whether the District Court had jurisdiction to grant the preliminary injunction staying trial of the case in the state court; (3) whether plaintiff waived its right to make a defense herein, and (4) whether the state action and injury in question are covered by the policy. [37]

The first three questions may be readily answered in the affirmative. The right of the court to entertain the action is settled by *Associated Indemnity Corp. v. Manning*, 9 Cir., 92 F.(2) 168; *Aetna Life Ins. Co. v. Haworth*, 300 U. S. 227; *Aetna Casualty & Surety Co. v. Yeatts*, 4 Cir., 99 F.(2) 665; *Maryland Casualty Co. v. Hubbard*, 22 F. Supp. 697. Section 265 of the Judicial Code (28 USCA Sec. 379) places no limitation upon the jurisdiction of the Federal court, and if the complaint discloses a case for the exercise of equitable and injunctive powers an injunction may issue as it did in the present case. *Smith v. Apple*, 264 U. S. 274; *Sovereign Camp Woodmen of the World v. O'Neill*, 266 U. S. 292, 298; *Alliance Insurance Co. of Phila. v. Jamerson*, 12 F. Supp. 957; *Jamerson v. Alliance Ins. Co. of Phila.*, 87 F.(2) 253. Because of the view hereinafter expressed upon the coverage question that of waiver becomes immaterial.

The provisions of the policy applicable to coverage are as follows:

“The purposes for which the automobile is to be used are commercial.

“(a) The term ‘pleasure and business’ is defined as personal, pleasure, family and business use. (b) The term ‘commercial’ is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named insured’s business occupation as expressed in Item 1. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof. * * *

“Coverage A—Bodily injury liability. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.” [38]

The remaining question then is whether the defendants were in the act of UNLOADING the truck when the accident happened. There is no dispute that the defendants were using the automobile commercially for the transportation and delivery of vegetables in direct connection with the insured’s business occupation as expressed in the policy.

In the action in the state court the pleadings admitted that the truck was parked alongside the curb

about ten feet from the Piccadilly Inn. The assistant on the truck (one of the defendants) carried from the truck and into the Inn some vegetables and was returning to the truck when he ran across the sidewalk looking backwards, and collided with Mazilla Tighe (plaintiff in said action). The evidence here shows that instead of the truck's being parked at the curb ten feet from Piccadilly Inn, it was parked at the curb on the opposite side of the street, and that the assistant making the delivery intended to return to the truck for further produce to be delivered to the Inn.

Plaintiff cites a number of cases whose similarity to the instant case is that in each an automobile was used by the insured for delivery purposes, but the crucial point of liability depending upon the "unloading" of the vehicle was determined in the light of the facts in each case. And that must be the test here.

Plaintiff contends "(1) that unloading is complete when the goods are physically removed from the truck, and that the process of delivery is entirely different from unloading; (2) that if, under any circumstances, delivery is part of unloading, the unloading is complete when the delivery is actually made; (3) so far as some future or additional unloading is concerned, it certainly would not start until some physical act was performed on or about the truck for the purpose of effecting such unloading, [39] and the mere intent in the mind of the boy in returning from the Piccadilly Inn, crossing

the sidewalk and crossing the street, to unload some further goods constituted no act of unloading within the meaning of the policy."

Such a construction of the policy as that contended for is entirely too narrow. Insured was using his truck in making delivery of produce to a customer. When the accident happened, the process of unloading was in operation. It was a continuing process, including delivery, and could not be complete until all of the produce was delivered to the Inn. The accident happened while the unloading was being consummated. The facts show that the state action and the alleged injury are covered by the policy. Such a construction is consistent with both reason and justice, and is supported by *Carl Ingalls Inc. v. Hartford Fire Ins. Co.*, 137 Cal. App. 741; *Mutual Ins. Co. v. Hurni Co.*, 263 U. S. 167, 174.

Upon the issues presented I therefore find (1) that the United States District Court has jurisdiction under the Federal declaratory relief act to entertain this suit; (2) that this Court had jurisdiction to stay the trial of the action in the state court, and the preliminary injunction for that purpose was, under the circumstances, properly allowed by this Court; (3) that plaintiff did not waive its right to make a defense in this suit; and (4) that the state action and injury in question is covered by the policy.

Dated: September 11, 1939.

[Endorsed]: Filed Sept. 11, 1939. [40]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF
LAW

From the pleadings, evidence and stipulations of the parties hereto, the court finds the following to be the facts:

1. That plaintiff, Maryland Casualty Company, is now and was at all times mentioned in the complaint a corporation organized and existing under and by virtue of the laws of the State of Maryland, duly authorized and licensed to do business in the State of California, and having its principal place of business within the State of California in the City and County of San Francisco.

2. That at the time of the filing of the complaint herein, the defendant Mazilla Tighe was a citizen of the State of California, and resided in the County of Alameda in said state; that at the time of the filing of the complaint herein, the defendant Ah Chong was a citizen and subject of the Republic of China, and resided in the City and County of San Francisco, in the State of California; that at the time of the filing of the complaint herein, the defendant Leong Cheung was a citizen of the State of California, and resided in the City and County of San Francisco in said state.

3. That the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars (\$3000.00).

4. That this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial

Code, Section 274d, 28 U. S. C. A. Section 400). [41]

5. That on or about the 3rd day of April, 1937, plaintiff issued a policy of automobile insurance to defendant Ah Chong; That the policy period was from April 3, 1937, to April 3, 1938, and said policy was in effect during all of said period; that in said policy plaintiff agreed with defendant Ah Chong to pay on behalf of defendant Ah Chong, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums, not exceeding \$5,000 for each person and not exceeding \$10,000 for each accident, which defendant Ah Chong should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance and use of a certain automobile described in said policy as a 1929 Model Kleiber 1½ Ton Truck, M#16EC7717; that said policy further provided that the purposes for which said automobile was to be used were commercial and that use of said automobile for said purposes included the loading and unloading thereof; that a true copy of said policy is attached to the complaint herein, is marked Exhibit "A" and the same is made a part thereof.

6. That on or about the 25th day of January, 1938, defendant Mazilla Tighe commenced an action for damages against defendants Ah Chong and Leong Cheung in the Superior Court of the State

of California, in and for the City and County of San Francisco, entitled Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants, and numbered therein No. 278962; that in the complaint of said Mazilla Tighe, in said action said Mazilla Tighe alleged that on the 26th day of November, 1937, said Leong Cheung was an [42] employee of said Ah Chong and, while so employed, said Leong Cheung made a delivery of vegetable produce to a restaurant known as Piccadilly Inn and located in the 300 block of Sutter Street in San Francisco, from a delivery truck parked at the curb on said Sutter Street and opposite to, and about ten feet from, the entrance of said Piccadilly Inn; that at said time and place said Mazilla Tighe was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilly Inn; that at said time and place said Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: that after making a delivery to the aforesaid Piccadilly Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder, as he continued running forward, in a negligent and careless manner; that he ran toward the aforesaid truck at the curb, and in so doing collided with said Mazilla Tighe was knocked

violently to the sidewalk and was caused to sustain injuries as more particularly in said complaint appears; that as a result of said collision said Mazilla Tighe suffered injuries and loss of earning capacity, and incurred and will incur expense for medical and nursing attention, in the aggregate amount, to the date of filing said complaint, of \$10,390; in said complaint said Mazilla Tighe prays for judgment against said Ah Chong and Leong Cheung, and each of them, as follows: For general damages in the sum of \$10,000, for special damages incurred to date of filing said complaint in the sum of \$390, for such further special damages as may be incurred subsequent to the date of filing said complaint, for costs of suit, and for such other and further relief as [43] to the Court may seem meet in the premises; that a true copy of said complaint is attached to the complaint herein, is marked Exhibit "B", and the same is made a part thereof.

7. That the facts as they are set out in the complaint heretofore referred to and designated as Exhibit "B" and as developed on the trial of this case indicates that the alleged accident and resulting injury, if any, occurred as the defendants were using this truck in making delivery of produce to a customer and while defendant Leong Cheung was returning to the truck to obtain further vegetables for delivery, and is within the coverage of the aforesaid policy hereinbefore designated as Exhibit "A".

8. That an actual controversy exists as between plaintiff and defendants herein, as follows: De-

defendants Ah Chong and Leong Cheung contend that since the automobile referred to in said complaint in said action brought by said Mazilla Tighe is the same automobile described in said insurance policy plaintiff herein has the obligation under said policy to defend said Ah Chong and Leong Cheung in said action; further, defendants Ah Chong, Leong Cheung and Mazilla Tighe contend that if it should be adjudged in said action that said Ah Chong and Leong Cheung have any liability to pay any sums to said Mazilla Tighe by reason of the alleged accident set forth in said complaint in said action, then plaintiff herein has the obligation under said policy to pay said sums to said Mazilla Tighe up to the aggregate amount of \$5,000; on the other hand, plaintiff herein denies and controverts said contentions and each of them and on its part contends that although the automobile referred to in said complaint of said Mazilla Tighe is the same automobile described in said policy of insurance, plaintiff herein has no obligations or liability under said policy so far as said alleged accident is concerned because [44] said alleged accident did not arise out of the use of said automobile or the loading or unloading thereof; further plaintiff herein contends that it was released of all obligations and liability under said policy so far as said accident is concerned by reason of the failure of defendant Ah Chong to notify plaintiff that any such accident occurred for more than sixty days after it is alleged in said complaint the same occurred.

9. That the defendant Ah Chong requested plaintiff herein to defend in the name of and on behalf of defendants Ah Chong and Leong Cheung in the state action No. 278962, brought by Mazilla Tighe in the Superior Court of the State of California, in and for the City and County of San Francisco; that plaintiff herein assumed charge and control of the aforesaid action and did defend said action and did by and through its attorneys on the 17th day of February, 1938, in the office of the County Clerk of the Superior Court, file an answer to said complaint of Mazilla Tighe, in action No. 278962, on behalf of defendants Ah Chong and Leong Cheung; that plaintiff's consent to defend said action was subject to a reservation of rights as to defendant Ah Chong only.

10. That a declaratory judgment or decree herein is proper to determine the rights and other legal relations of the parties hereto in the manner set forth at length in Paragraph X of plaintiff's said complaint.

11. That within six days after the commencement of the said action in the said Superior Court the complaint in said action was delivered by said defendants Ah Chong and Leong Cheung to the plaintiff; that plaintiff, before undertaking the defense of said action did not, until or [45] before March 7, 1938, notify said defendants that it would undertake the defense of said action under the reservation of the rights to claim that its policy did

not cover the injury alleged and involved in the complaint in said action in the state court or that it had been relieved of liability under said policy by failure of the insured to give prompt notice of said accident, and then only the defendant Ah Chong was notified by the aforesaid letter from plaintiff to Ah Chong dated March 7, 1938, a copy of which is attached to the answer of defendants Ah Chong and Leong Cheung herein and marked Exhibit "1".

12. With regard to the accident involved in said action in the state court, the court finds that on the 26th day of November, 1937, the truck in question was parked against the curb on the opposite side of Sutter Street from Piccadilly Inn, and the said defendant Leong Cheung removed certain vegetables from said truck and carried them across Sutter Street and across the sidewalk thereof into said Piccadilly Inn, and there delivered and left the said vegetables. He then started to return to said truck for the purpose of obtaining further vegetables to deliver to the said Piccadilly Inn, and if the said plaintiff Leong Cheung collided at all with plaintiff Mazilla Tighe (which said plaintiff Leong Cheung denies) the collision happened as he emerged from said Piccadilly Inn for the purpose of obtaining further vegetables and before the unloading of vegetables for Piccadilly Inn from said truck had been completed.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the court finds and decides: [46]

1. That the defendants Ah Chong and Leong Cheung have not waived their rights under said policy by failure to give notice of said accident in accordance with the terms of said policy.

2. That this court has jurisdiction under the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A. Section 400) to entertain this suit.

3. That this court has jurisdiction to stay the trial of the action in the state court and the preliminary injunction for that purpose was, under the circumstances, properly allowed by this court.

4. That the cause of action alleged and involved in the complaint, according to the allegations of the complaint in the state court, and as developed on the trial of this case, occurred after certain vegetables had been delivered by defendant Leong Cheung from the truck and while he, Leong Cheung, was returning to the truck for another load to be delivered; and it appears from the evidence herein that if the alleged accident was at all caused by the insured, it occurred while the unloading was being consummated and before it had been completed and such an injury would be within the coverage of said policy.

5. That plaintiff take nothing by its said action and that defendants recover their costs of suit

herein and that the preliminary injunction issued herein be dissolved.

Let judgment be entered accordingly.

Dated: This 24th day of November, 1939.

A. F. ST. SURE

District Judge

Copies mailed to

Treadwell & Laughlin

Charles B. Morris [47]

Received a copy of the within Amended Findings, etc., this 22nd day of November, 1939.

TREADWELL & LAUGHLIN

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 24, 1939. [48]

[Title of District Court and Cause.]

ORDER AMENDING FINDINGS

The motion of the plaintiff to amend the Findings on file herein came on regularly for hearing this day, Edward F. Treadwell, Esq., appearing on behalf of plaintiff, and Charles B. Morris, Esq., appearing on behalf of the defendants Ah Chong and Leong Cheung, and Messrs. Young & Ryan appearing for the defendant Mazilla Tighe, and said matter having been argued by counsel and submitted to the court, and the court being now fully advised in the premises,

It Is Hereby Ordered:

1. Paragraph 9 of said Findings is hereby amended to read as follows:

“9. That the defendant Ah Chong requested plaintiff herein to defend in the name of and on behalf of defendants Ah Chong and Leong Cheung in the state action No. 278962, [49] brought by Mazilla Tighe in the Superior Court of the State of California, in and for the City and County of San Francisco; that plaintiff herein assumed charge and control of the afore-said action and did defend said action and did by and through its attorneys, on the 17th day of February, 1938, in the office of the County Clerk of the Superior Court, file an answer to said complaint of Mazilla Tighe, in action No. 278962, on behalf of Defendants Ah Chong and Leong Cheung.”

2. Paragraph 11 of said Findings is hereby amended to read as follows:

“11. That plaintiff at no time prior to the commencement of this action for declaratory relief waived its right to claim that said policy did not cover the said accident, and the said plaintiff had not by its conduct or otherwise waived its right to defend against liability on the ground that said accident was not covered by said policy.”

Dated: January 8, 1940.

A. F. ST. SURE

District Judge

Approved as to form.

TREADWELL & LAUGHLIN

EDWARD F. TREADWELL

Attorneys for Plaintiff

CHARLES B. MORRIS

Attorneys for Defendants

Ah Chong and Leong Cheung

YOUNG & RYAN

Attorneys for Defendant

Mazilla Tighe

[Endorsed]: Filed Jan. 19, 1940. [50]

In the District Court of the United States in and
for the Northern District of California, South-
ern Division.

Equity No. 4279S

MARYLAND CASUALTY COMPANY,
a corporation,

Plaintiff,

vs.

MAZILLA TIGHE, AH CHONG and LEONG
CHEUNG,

Defendants.

JUDGMENT

In the above entitled action the defendants Ah Chong and Leong Cheung appeared and answered by their attorney, Charles B. Morris, and the de-

fendant Mazilla Tighe appeared and answered by her attorneys, Young & Ryan, and the said cause having come on regularly for trial before Hon. A. F. St. Sure, and evidence oral and documentary having been introduced and said cause argued and submitted to the court and the court having filed its findings of fact and conclusions of law and being now fully advised in the premises,

It Is By the Court Here Considered Ordered, Adjudged and Decreed:

1. That the defendants Ah Chong and Leong Cheung have not waived their rights under said policy by failure to give notice of said accident in accordance with the terms of said policy.

2. That this court has jurisdiction under the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A. Section 400) to entertain this suit.

3. That this court has jurisdiction to stay the trial of the action in the state court and the preliminary injunction for that purpose was, under the circumstances, [51] properly allowed by this court.

4. That the cause of action alleged and involved in the complaint, according to the allegations of the complaint in the state court, and as they developed in the trial of this case, occurred after certain vegetables had been removed from the truck and delivered, but it appears by the evidence here that, if the accident was at all caused by the insured, it was caused while the said Leong Cheung was returning to the truck to obtain from said truck further vege-

tables for delivery to the said Piccadilly Inn, and that such state action and injury would be and is within the coverage of said policy.

5. That plaintiff take nothing by its said action and that defendants have and recover from the plaintiff their costs of suit taxed at the sum of \$....., and that the preliminary injunction issued herein be and the same hereby is dissolved.

Dated: November 24, 1939.

A. F. ST. SURE

District Judge.

Received a copy of the within Judgment this 22nd day of November, 1939.

TREADWELL & LAUGHLIN

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 24, 1939. [52]

REPORTER'S TRANSCRIPT

Tuesday, March 28, 1939

(TESTIMONY)

APPEARANCES

For Plaintiff: Edward F. Treadwell, Esq.

For Defendants: Messrs. Young & Ryan, and
Charles B. Morris, Esq. [54]

Tuesday, March 28, 1939

Mr. Treadwell: If your Honor please, this is an action, as your Honor learned on the pretrial con-

ference, for declaratory relief; and, as incidental to the prayer for declaratory relief, it is also asking for an injunction against the prosecution of an action in the state court.

The action involves an automobile policy, your Honor; and the provisions of the policy which are material are quite short. The first paragraph (a) reads:

“The term ‘pleasure and business’ is defined as personal, pleasure, family and business use. (b) The term ‘commercial’ is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named insured’s business or occupation as expressed in Item 1. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.”

The other provision is on page 2, under the heading of, “I Coverage A—Bodily Injury Liability.” It reads:

“To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

“Coverage B—Property Damage Liability.

“To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the [55] automobile.”

The particular accident, your Honor, which is involved in this case and in the state court, is alleged in the complaint and admitted by the answer; I have the answer here; and it is set forth, in paragraph VI of the complaint here, reciting the allegations of the complaint in the state court:

“That on or about the 25th day of January, 1938, defendant Mazilla Tighe commenced an action for damages against defendants Ah Chong and Leong Cheung in the Superior Court of the State of California, in and for the City and County of San Francisco, entitled Mazilla Tighe, Plaintiff, vs. Ah Chong, Leong Cheung, John Doe, Richard Roe, Black and White Company, a corporation, Defendants, and numbered therein No. 278962; that in the complaint of said Mazilla Tighe in said action said Mazilla Tighe alleged that on the 26th day of November, 1937, said Leong Cheung was an employee of said Ah Chong and, while so employed, said Leong Cheung made a delivery of

vegetable produce to a restaurant known as Piccadilly Inn and located in the 300 block in Sutter Street in San Francisco, from a delivery truck parked at the curb on said Sutter Street and opposite to, and about ten feet from, the entrance to said Piccadilly Inn; that at said time and place said Mazilla Tighe was a pedestrian on said Sutter Street and was walking in an easterly direction upon the sidewalk adjacent to and in front of said Piccadilly Inn; that at said time and place said Leong Cheung conducted himself generally in a careless, reckless and negligent manner; that at said time and place Leong Cheung was careless and negligent in the following manner: that after making a delivery to the aforesaid Piccadilly Inn, he ran from the entrance thereof, and in so running at said time and place, looked backward over his shoulder as he continued running forward, in a negligent and careless manner; that he ran toward the aforesaid truck at the curb, and in so doing collided with said Mazilla [56] Tighe as she walked along the aforesaid sidewalk, with such force and effect that said Mazilla Tighe was knocked violently to the sidewalk and was caused to sustain injuries as more particularly in said complaint appears——”

That such accident did not arise out of the use, operation or ownership of the automobile or truck, and was not connected with the loading or unloading thereof.

Now, your Honor, the facts in the case are practically, with one exception, stipulated to. The accident is alleged to have occurred on the 26th day of November, 1937; and the complaint was filed in the state court by Mazilla Tighe on January 25, 1938. On January 31, 1938, the Maryland Casualty Company received notice of the action by the complaint and summons served on the assured and his employee, being brought to the offices of the company. That was the first notice, your Honor, that the Maryland Casualty Company ever received of the accident. I have not read the provision of the policy, your Honor, in regard to notice; but it provides, as I remember it, for notice as soon as practicable after the accident.

We will show, your Honor, from that time the Maryland Casualty Company consulted its main office, and was directed to defend the action, but to reserve all rights, claiming that it was released by lack of notice, and that it was not within the coverage of the policy.

On February 17th, an answer was filed, through the Insurance Company; but, at that time, both of the parties, the assured and his employee, were informed that it was reserving the right and claiming that it was not covered by the policy, and that it had been released; and this was followed up, your Honor, on March 7th, by written letter making a record of the fact that they had been so informed and informing them that the Surety Company was [57] proceeding, reserving all rights, and particu-

larly that the matter was not covered by the policy, and that it had been released by lack of notice.

That is all the opening statement that we desire to make. We want to put in very little evidence. If counsel wishes to make a statement at this time, he may; or we will put in our evidence.

Mr. Ryan: May it please your Honor, I represent Mazilla Tighe, the plaintiff in the Superior Court action; and I wish at this time to raise only the following points which were already outlined, I believe, in the pretrial conference: the first one being that, under the provisions of the Judicial Code, 274d, this Court has no jurisdiction to entertain declaratory relief.

The second point I wish to raise at this time is that, under Section 265 of the Judicial Code, the Court was in error in allowing an injunction to issue in this case, staying the proceedings in the state court.

And, lastly, there has been such an appearance in this case that the plaintiff, Maryland Casualty Company, if they had any rights previously, they have waived the same. I believe Mr. Morris, who represents Ah Chong, will argue that point.

Lastly, that, under the terms of the policy itself, if it goes to the merits, the Chinaman, I believe, was adequately covered within the provisions of the automobile policy that they have already set out.

Now, with reference to the first point, I wish to make a few short statements relative to the jurisdictional point and the injunction point—

The Court: I understand the evidence will be very brief, Mr. Ryan?

Mr. Ryan: Yes, the evidence will be very brief.

The Court: Might it not be better to proceed with the introduction of the evidence; and, after the evidence is all in, I will [58] listen to your argument?

Mr. Ryan: That will be perfectly satisfactory.

Mr. Morris: Will that go for my argument, also?

The Court: Yes.

EARL C. BERGER,

called for the plaintiff; sworn.

Direct Examination

Mr. Treadwell: Q. What is your business, Mr. Berger? A. I am an attorney.

Q. Do you live in San Francisco? A. Yes.

Q. Were you ever connected with the Maryland Casualty Company?

A. I was; but I am no longer.

Q. In what capacity were you connected with the Company? A. As an attorney and an adjuster.

Q. Do you remember the occasion when the complaints were brought to the Company in this case of Mazilla Tighe against two Chinamen,—Ah Chong and Leong Cheung?

A. Yes, I remember the complaint coming in and its being assigned to me, the day it came in.

The Court: You are referring now to the Superior Court action?

(Testimony of Earl C. Berger.)

Mr. Treadwell: Yes.

The Court: What is the number of it?

Mr. Treadwell: The number of that action is 278962.

Q. Had the Company received any notice of the accident before these complaints were brought in?

Mr. Morris: I object to that, if your Honor please, as to what the Company had received, as it is what he knows.

The Court: Objection sustained, as the witness testified that the complaints and summons were brought to him. [59]

Mr. Treadwell: Q. Can you tell when it was the complaint and summons were brought to your office, Mr. Berger? A. The date?

Q. Yes.

A. Well, I would have to refresh my memory.

Q. I show you a file.

A. I recognize this as being the file.

Q. Now, refreshing your memory from that, will you state when those complaints were brought in?

A. According to the notation, I received the summons and complaint—by that, I mean it came to our office, on January 31, 1938.

Q. And, so far as your own knowledge is concerned, at the time you received it, had you heard anything about the accident before the summons and complaint were brought to your office?

A. No. This was the first notice the office of the

(Testimony of Earl C. Berger.)

Company received of any accident or anything pertaining to the matter at all,—the very first notice.

Q. Now, upon receiving that, did you communicate with the home office of the Company?

A. Yes, sir.

Q. Did you receive from the home office this letter, which I show you, dated February 12, 1938?

Mr. Morris: I object to that, your Honor, as self-serving.

Mr. Treadwell: I am not offering it yet. I am just asking if he received it.

The Court: Overruled.

The Witness: A. Yes, I recognize it as a reply to my communication to the home office.

Mr. Treadwell: Have you seen this?

Mr. Morris: No.

Mr. Treadwell: I offer this letter in evidence, your Honor, as a part of the examination of the witness.

Mr. Morris: If your Honor please, the defendant Ah Chong objects to the introduction of this letter, on the ground that it is self-serving, not binding upon him.

The Court: I have not seen the letter. [60]

Mr. Ryan: I join in that objection, on the part of Ah Chong, that it is not binding; immaterial, irrelevant and incompetent.

The Court: Read the letter.

(Testimony of Earl C. Berger.)

Mr. Treadwell:

(PLAINTIFF'S EXHIBIT No. 1)

“Maryland Casualty Company Air Mail to San Francisco Claim Division. Date: February 12, 1938. From Claim Division. H. O. File No. 58848-0-38-Auto.

Subject Ah Chong Mazilla Tighe.

“We have your report of investigation, copy of the bill of complaint, which crossed my letter of February 8 to you.

“This is a rather peculiar case, but we do note that the plaintiff's attorney has entered ‘John Doe, defendant,’ which would leave him the privilege of bringing in either the city or the owner of the restaurant, by an amended complaint.

“It is also noted that mention of the assured's truck is made in this complaint, and, pending further thought and discussion in the matter, we are suggesting that you accept this case under a reservation of rights and enter appearance.

“We know that in the meantime you will use every effort in an endeavor to locate other witnesses.

J. P. CALHOUN,
Supervisor.”

The Court: You are offering it for what purpose?

Mr. Treadwell: We are offering it for the pur-

(Testimony of Earl C. Berger.)

pose of showing the authority of this witness to do what he did, namely, to communicate this fact to the defendants.

The Court: Objection overruled.

(The letter was marked "Plaintiff's Exhibit No. 1.")

Mr. Treadwell: Q. Now, upon receiving that air mail letter of February 12th, did you have any talk with Ah Chong and Leong Cheung, before or at the time that the answer was prepared?

A. Yes, I spoke to both of them. I was the one who raised the question of coverage; that is, I initiated the question and consulted with my home office, because it struck me the automobile policy did not [61] cover the situation, and it was the subject matter of the complaint in the Superior Court. I explained to Mr. Ah Chong and to his employee, Mr. Leong Cheung, that, in my opinion, there was no coverage for this type of complaint. I must admit that I had some difficulty in explaining the matter to them; and I told them that the very best I could do would be to recommend to the Company that we handle the defense, reserving all rights, as a matter of courtesy to them. I took his statement as to the facts concerning the accident; and, in fact, I took the statements of both men, and made it very clear to them that, in what I was doing, we were not assuming——

Mr. Ryan: I wish to object to this line of testimony as being incompetent, and irrelevant, and not

(Testimony of Earl C. Berger.)

binding on Mazilla Tighe, and being strictly self-serving. Ah Chong is not a party to this action, so far as Mazilla Tighe is concerned; she cannot be bound by the testimony.

The Court: I think that objection is good.

Mr. Treadwell: We do not think that, under the authorities, you have to do more than notify the assured.

The Court: How do you mean?

Mr. Treadwell: We are defending him; and, in defending him, we have the right, under the authorities, to notify him that our defense is with a full reservation of rights; and, if we did that, then we have not waived anything. They are pleading here that, by defending, we waived our rights.

The Court: The objection is overruled.

Mr. Treadwell: Q. You may proceed.

A. I explained to the two men that our undertaking to interpose an answer was without prejudice on our part; that, in the event any judgment was rendered against them, the Company would not pay it; the only thing we would do would be to give them as good a defense as we would if there were coverage, and that we would not charge any attorney's [62] fees; but, beyond that, we could not go. I asked Mr. Ah Chong if he had any son or relative who might understand English better; he said he would have his broker get in touch with me; Mr. Wright, his broker, did get in touch with me, and I explained the matter to him. Then, after that, I fol-

(Testimony of Earl C. Berger.)

lowed it up with a letter explaining our position in the matter.

Mr. Treadwell: It is stipulated, your Honor, that that letter which is attached to the answer might be read without further proof; and I now offer it in evidence, being Defendants' Exhibit 1, attached to the answer of Ah Chong and Leong Cheung.

“Maryland Casualty Company; Silliman Evans, Chairman of the Board; Edward J. Bond, Jr., President. San Francisco Claim Division, 210 Sansome Street, San Francisco, Calif. Geo. W. Ecrement, Jr., Mgr. Donald Seibert, Attorney. 58848-0-38-Auto Ah Chong.

BI-Mazilla Tighe

March 7, 1938

“Mr. Ah Chong

“128 Oregon Street

“San Francisco, California

“Dear Sir:

“We have heretofore received from you a copy of Summons and Complaint, served upon you in an action commenced against you and your employee, Leong Chong, by Mazilla Tighe, in the Superior Court of the State of California, in and for the City and County of San Francisco, to recover damages in the sum of \$10,390.00, and costs, for personal injuries alleged to have been sustained by the said Mazilla Tighe, as a result of an accident which occurred on or about November 26, 1937. We have ac-

(Testimony of Earl C. Berger.)

cepted the defense of this action under a complete reservation of our rights, because of late notice to us of the accident, and for the other reasons herein stated.

“It appears that the accident in question occurred on or about November 26, 1937, but we were not notified of same until at [63] least January 31, 1938, and as a result we have been prejudiced in any handling of this matter.

“As you are familiar, our policy, #15-537989 covers automobile accidents, and it appears that the accident in question is not such an accident as contemplated by the policy, as it does not appear that the injuries claimed by the claimant were sustained as a result of the operation of your automobile.

“It is also to be noted that whereas damages sought by the plaintiff are in the sum of \$10,390.00, plus costs, our liability under the terms of the policy above-mentioned is limited to the sum of \$5,000.00. In the event that it appears that this company is liable under the terms of the policy, such liability, of course, is limited to the sum of \$5,000.00, and any part of a judgment which might be rendered in the pending suit in excess of that sum will, therefore, have to be paid by you.

“We are appearing in this case on your behalf through our attorney, Donald Seibert, of 210 Sansome Street, San Francisco, who will

(Testimony of Earl C. Berger.)

represent you at the trial and defend the action without expense to yourself; but we are writing you at this time to advise you that, in view of your excess interest above-mentioned, you may, if you so desire, associate your own attorney with ours in the defense of the suit, it being understood, of course, that this will be done at your own expense.

“We kindly request you to acknowledge receipt of this letter on the enclosed carbon copy thereof, which we ask you to return to this office as soon as possible.

“Very truly yours,

“GEO. W. ECREMENT, JR.,

Mgr.,

“per (signed) EARL C. BERGER,
Adjuster.”

Q. Mr. Seibert: Was he your superior there?

A. Yes; he was attorney of record. There were several attorneys under him. I sent that letter.

Q. You sent that letter?

A. Yes; I had charge of the thing. Mr. [64] Seibert did not see many matters.

Mr. Treadwell: That is all.

Cross Examination

Mr. Ryan: Q. Mr. Berger, I show you this letter dated March 4, 1938, addressed to Young & Ryan, 1106 Broadway, Oakland, in which you requested the deposition of Mrs. Tighe. Is that right?

(Testimony of Earl C. Berger.)

A. Certainly.

Q. You wrote this letter?

A. After having spoken to you over the phone, Mr. Ryan.

Q. You took the deposition of Mazilla Tighe, did you not? A. Yes, sir.

Q. You did so as a representative of Mr. Seibert and the Maryland Casualty Company, when you did that?

A. No; I took it as a representative of the two defendants.

Mr. Treadwell: Do you want to read that letter in evidence?

Mr. Ryan: This is a letter on the printed form of Donald Seibert, attorney, 5th floor, 206 Sansome Street, San Francisco, Cal. March fourth, 1938:

DEFENDANTS' EXHIBIT A

"Young & Ryan, Esqs.,

"1106 Broadway,

"Oakland, Calif.

Re. Tighe vs. Chong

"Gentlemen:

"This will confirm our phone conversation of today relative to the taking of the deposition of the defendant Chong in the offices of Freed & Freed in the Mills Building, at 2:30 p. m. on Tuesday, March 8th 1938.

"In the meanwhile I would thank you to advise whether we cannot take the plaintiff's

(Testimony of Earl C. Berger.)

deposition at the same time and place inasmuch as it was our intention to move for same.

“With appreciation for your kind advices, I am

“Yours very truly,

“DONALD SEIBERT,

“per EARL C. BERGER.” [65]

I would like to have that introduced in evidence.

(Letter marked “Defendants’ Exhibit A.”)

Mr. Ryan: Q. Pursuant to that, you did take the deposition?

A. Yes, I took the deposition; and, as I stated, Mr. Ryan, as representing the defendants, not the Company or Mr. Seibert.

Q. You at no time apprised me of that fact, did you?

A. I believe I did, when I requested you for a stipulation extending the time to either answer the complaint or demur or make a motion with relation to the complaint. I believe I did acquaint you with that fact.

Q. Did you put in the answer to the complaint in the state court?

A. Did I put the answer in?

Q. Yes. You drew the answer and filed it, didn’t you? A. Yes.

Q. You also paid the filing fee of two dollars in the state court?

A. Well, I filed it. I could not tell you the date.

(Testimony of Earl C. Berger.)

Whatever date appears in the answer is probably the proper date.

Mr. Treadwell: It will be stipulated that was filed February 17, 1939.

Mr. Ryan: I think that is correct: February 17th. That is all.

Cross Examination

Mr. Morris: Q. You received the summons and complaint in the state court action brought by Mazilla Tighe against Ah Chong and Leong Cheung—you put the date around January 31st?

A. January 31st.

Q. After you had received those papers, did you have any conversation with Leong Cheung or Ah Chong? A. With both.

Q. How soon afterwards?

A. I cannot tell you exactly; but it might have been a day or two.

Q. Did you tell them, at that time, that you were handling the matter under reservation of rights?

A. Yes, I did. I did [66] not use those very words, because I did not think they would understand those words; but I used simpler words, explained to them that an automobile policy would not cover this type of complaint any more than a fire insurance policy would cover it.

Q. Where was that conversation.

A. At 210 Sansome Street, my office.

Q. Was anybody with them, or were they alone?

(Testimony of Earl C. Berger.)

A. The two men came in together. It was a room with five desks in it, and I was in there and other men were in there; but I do not believe they heard the conversation; they were attending to their own business.

Q. Did they come in alone?

A. The two of them did, yes; and then I had Mr. Leong Cheung in the office twice after that.

Q. Leong Cheung? A. Yes.

Q. That is the younger man that was the driver, is it not, when you speak of "Leong Cheung"?

A. Well, after speaking to Mr. Ah Chong,—that is, the employer,—I told them that they had better get somebody who understod the situation a little better, and he had Mr. Wright get in touch with me, and I then explained to Mr. Wright what was required.

Q. What was the date of the conversation, if you know, when you had the talk with Mr. Ah Chong and advised him to get somebody who understood that?

A. Well, I am certain it was prior to the filing of the answer; prior to the drawing of the answer. I could not give you the exact date.

Q. That was some time before February 17th, the date you filed your answer? A. Yes.

Q. Was it before you had communicated with your home office?

A. Yes. I was in touch with them again after that.

(Testimony of Earl C. Berger.)

The Court: Q. Was it before you communicated with your home office?

A. It was before the filing of the answer that I had communicated with the men. [67]

Mr. Morris: Q. Now, Mr. Berger, why did you try to tell Ah Chong, the first time you talked to him, about this policy?

A. In my opinion, after reading the complaint and after speaking to the men, in getting their version of what had happened, that that occurrence or happening was not such as would be covered by the automobile policy in question; that they would have to get their own attorney. That is when I sent Mr. Ah Chong to Mr. Wright and asked him to have someone get in touch with me in order that I could discuss the matter more intelligently.

Q. Why did you do that; why did you send for Mr. Wright?

A. I did not send him directly to Mr. Wright; it was my idea that Mr. Wright spoke Chinese.

Q. Your impression was that Ah Chong did not know what you were talking about; is that right?

A. No; I believe he understood what I explained to him, but I think he was in a quandary. He said to me, "Well, I have insurance"; and he thought it covered any possible situation. I knew that Mr. Wright was his direct representative, as Mr. Wright is very friendly with many Chinese people and is considered a leader in Chinatown, and that perhaps Mr. Wright's explanation would carry more weight

(Testimony of Earl C. Berger.)

than I would, because I was a total stranger to the man.

Q. Now, you say you told him he ought to get his own attorney? A. Yes, sir.

Q. Did he get an attorney?

A. No; he had Mr. Wright communicate with me; and then I explained it to Mr. Wright; and Mr. Wright asked me if I could not do something about the matter; and I said, "Well, I will try to handle this thing, under reservation of rights, give him a defense, but not assume the payment of any judgment."

Q. When was that; about what time?

A. Before we put in the answer. [68]

Q. That was a verbal conversation with Mr. Wright, was it?

A. Yes; but that was subsequent to my conversation with both defendants.

Q. Now, you wrote to your home office; and when was it that you received your letter from the home office?

A. The reply from the home office is dated February 12th, and was received at our office three days later, the 15th of February.

Q. Now, upon receipt of this letter dated February 12th from your home office, what did you do, with respect to this reservation of rights?

A. I told the defendants to sign the answer; but, before having them sign the answer, I reiterated my position and said that the Company was willing to handle it, under this reservation of rights.

(Testimony of Earl C. Berger.)

Q. You wrote a letter, didn't you, on March 7th?

A. Yes.

Q. Why did you delay writing that letter until March 7th?

A. I don't know whether it would be called a "delay"; it was simply to go on record as to the oral understanding, to make the oral understanding more binding.

Q. Was there any doubt in your mind, when you dictated this letter of March 7th, that you had not made your position clear with Ah Chong?

A. No. There was no doubt in my mind. It was a matter of complying with regular practice in the office that I wrote that letter.

Q. Why didn't you write it earlier?

A. I didn't think that it would be needed, because it was so obvious that that type of case would not be covered by the automobile policy; that anyone, no matter how poor his English, would understand that; and I explained that to him, and I explained it to Mr. Wright, and they were satisfied with my explanation, so far as I could make out.

Q. Now, Mr. Berger, following your letter of March 7th, your Company continued to further the defense, did they not?

A. Yes; [69] they took the deposition.

Q. While you were still continuing the defense, there had been no substitution of attorneys?

A. Certainly not; because they never objected to anything; they understood what our position was—

(Testimony of Earl C. Berger.)

Mr. Morris: I object to what they understood.

The Court: That goes out.

The Witness: I will give you my impression about the substitution of attorneys—

Mr. Morris: Q. There has never been any substitution of attorneys up to date, has there?

A. No.

Q. And Mr. Seibert is still the attorney of record for Ah Chong and Leong Cheung, is he not?

A. Today?

Q. Yes. A. I don't know.

The Court: Q. You say that Mr. Siebert is the attorney of record for the defendants Ah Chong and Leong Cheung?

Mr. Morris: In the state court.

The Court: Q. In the state court?

A. Yes, in the state court.

Q. Did you ever get an acknowledgment of the letter of March 7th that you wrote to Ah Chong?

A. An oral acknowledgment, not one in writing.

Q. Whom did you get the oral acknowledgment from?

A. I got the oral acknowledgment from Mr. Wright.

Q. Did you ever write a letter to Leong Cheung?

A. I think I wrote to both of them.

Q. I will show you your letter,—the original. Can you tell, from that letter, whether you wrote to Ah Chong or Leong Cheung?

(Testimony of Earl C. Berger.)

A. This letter addressed, obviously, to Mr. Ah Chong—If I look through the file, I may find one addressed to Mr. Leong Cheung; I don't know.

Mr. Treadwell: We do not find any in the file.

The Witness: Well, I cannot say for certain; but it was my [70] impression that I had addressed both men.

Mr. Morris: That is all, Mr. Berger.

Mr. Treadwell: That is all. Now, if your Honor please, at the pretrial conference, it was agreed that any question of the incorporation of the plaintiff or its qualifications to do business here would be waived on the trial. You do withdraw any defense of that kind?

Mr. Morris: I have never raised it.

Mr. Ryan: Yes.

Mr. Treadwell: I think it was made clear, from what counsel read there, that the deposition was to be taken and was taken on March 8, 1938.

Mr. Ryan: That is correct,—by Mr. Berger, who took it at the instance of Mr. Donald Seibert, who was, at that time, attorney for the Maryland Casualty Company. Donald Seibert's office was with the Maryland Casualty Company. They put the answer in.

Mr. Treadwell: He was one of their employees as well as their attorney, and he put in an answer for the defendants,—the two Chinamen.

Mr. Ryan: Mr. Seibert is still the attorney of record in the state court; is that correct?

Mr. Treadwell: Yes, that is my understanding of it.

Mr. Ryan: Is he still with the Maryland Casualty Company?

Mr. Treadwell: He is still with them. That is all we wish to offer, your Honor.

Mr. Morris: If your Honor please, I would like to recall Mr. Berger just to put this letter in evidence, which I referred to, which is attached to the answer.

The Court: It has been read in evidence. [71]

WENTWORTH S. WRIGHT,

called for defendant Ah Chong; sworn.

Direct Examination

Mr. Morris: Q. Mr. Wright, what is your business?

A. I am an insurance broker.

Q. Are you acquainted with Ah Chong?

A. Yes, sir.

Q. And Leong Cheung? A. Yes.

Q. Have you business relations with them?

A. I am their insurance broker.

Q. You are their insurance broker?

A. Yes.

Q. And was it through you that this insurance that is involved in this case was placed with the Maryland Casualty Company? A. Yes.

(Testimony of Wentworth S. Wright.)

Q. Now, Mr. Wright, do you recall the occasion when the suit was filed by Mazilla Tighe against Ah Chong and Leong Cheung? A. Yes.

Q. Were those papers ever in your possession?

A. Yes; they were brought to my office.

Q. Who brought them to your office?

A. Ah Chong.

Q. What did you do with them?

A. I phoned to the Maryland Casualty Company and asked them to send an adjuster over, who took a statement on the part of the claim, in my office.

Q. Where was that?

A. 519 California Street.

Q. Who was present at that time?

A. Ah Chong and Leong Cheung and the adjuster—I have forgotten his name.

Q. Was it this gentleman: Mr. Berger?

A. I don't think so.

Q. Now, was anything said there about a reservation of rights?

A. Nothing at all; there was no mention made that the claim was not a claim under the policy.

The Court: Q. At any time?

A. Well, the first time was about either a day or two days before that letter of reservation of rights was sent. At that time, an adjuster from the Maryland Casualty Company called at my office personally and advised me that they were going to send such a letter; and I talked to him for more than [72] two hours, as vigorously protesting as I could any such act on their part.

(Testimony of Wentworth S. Wright.)

Mr. Morris: Q. Mr. Wright, prior to this occasion that you have just referred to, a few days before they wrote the letter—You are referring now to the letter of March 7th?

A. I am referring to the letter of reservation of rights; I do not recall the date.

Q. I will show you the letter and will ask you if you recognize the letter as one you are referring to.

A. This is the letter.

Q. It was two days before that, that the adjuster informed you they were going to write you such a letter?

A. It was either the day before or two days before.

The Court: Q. Was that the first time you ever heard anything about reservation of rights?

A. The first mention made to me that the Company was.

Mr. Morris: Q. Were you ever present when anything was said to Ah Chong or Leong Cheung about reservation of rights?

A. Not to my knowledge; at that time, there had never been anything said.

Mr. Morris: That is all.

Cross Examination

Mr. Treadwell: Q. Mr. Wright, do you know the name of the adjuster who came over immediately after the complaint was put in your hands?

A. No; I said I did not remember his name.

(Testimony of Wentworth S. Wright.)

Q. The second time that an adjuster came to your office and you had this talk with him, who was that?

A. I am not sure; I think it was Mr. Moore.

Q. Mr. Moore? A. Yes.

Q. As soon as the complaint was filed, I take it that the two Chinamen brought it into your office?

A. Yes, sir.

Q. Did they tell you, after that, that they had been up to the [73] office and had a talk with Mr. Berger?

A. I do not recall.

Q. You do not recall? A. No.

Q. Did you go to Mr. Berger's office and have a talk with him?

A. No.

Q. You never had any talk, referring to this case, with Mr. Berger?

A. After that letter of reservation of rights was sent out, I talked to Mr. Berger; and in no uncertain form.

Q. Didn't you go up, before that, and have a talk with Mr. Berger?

A. No.

Q. Didn't the Chinamen tell you that they had been to Mr. Berger and had a talk with him?

A. I said I did not recall.

Q. You do not recall that at all? A. No.

Q. Didn't they tell you that there was some trouble regarding the matter?

A. No.

Q. Nothing at all? A. No.

Q. A couple of days, you think, either a day or two days, before this letter was written, some-

(Testimony of Wentworth S. Wright.)

body did come in, you think his name was Mr. Moore, and tell you about this? A. Yes.

Q. That was the first time you had heard of this; is that right? A. That is right.

Q. Do these Chinamen talk pretty good English?

A. I would not say "pretty good," but good enough so that I could understand them.

Q. Well, I mean, didn't they talk so that people generally could understand them?

A. I do not think so—the younger man does.

Q. The younger man. How old a man was he?

A. He was about 22 and 23.

Q. Born in this country?

A. I don't know as to that.

Q. How long have you known him?

A. I never knew the younger man until he came in on this case.

Q. You have known him since then?

A. Yes. [74]

Q. He understand English fairly well, does he?

A. Fairly well.

Q. Now, then, how did you come to get this letter?

A. As soon as Ah Chong got it, he brought it down to me.

Q. Did you talk to him about it?

A. There was not very much occasion to talk to him about it; he had received it; and I talked to the Maryland Casualty Company about it.

Mr. Treadwell: I think that is all.

AH CHONG,

called for the defendants; sworn.

Direct Examination.

Mr. Morris: Q. What is your name?

A. Ah Chong.

Q. Where do you live?

A. I live 128 Oregon Street.

Q. When the two papers were given you, what did you do with them?

A. Well, I took the paper and gave it to Mr. Wright.

Q. You gave it to Mr. Wright?

A. Yes, sir.

Q. Did you go to the Maryland Casualty Company's office after that—after you gave the paper to Mr. Wright?

A. No; somebody get a letter for me—a paper.

Q. Did you go to the Insurance Company's office after you got the paper? A. No.

Mr. Morris: If your Honor please, I have had some difficulty conversing with this man, and I called up the United States Attorney's office last night, and they gave me the name of an interpreter; and I have asked him to be present, and he is present in court.

The Court: Q. Were you born here?

A. No; born in China.

Q. How long have you been here?

A. I come here 1915.

(Testimony of Ah Chong.)

The Court: I think he can understand; he speaks plainly.

Mr. Morris: Q. Did you ever see that man before (pointing to Mr. Berger)? A. I see him before.

Q. Where did you see him?

A. Somebody give me a paper and I [75] go to see him, with Mr. Wright.

Q. Was Mr. Wright with you? A. Yes.

Q. Did you ever go there without Mr. Wright?

A. Mr. Wright take me there.

Q. Mr. Wright took you there; is that right?

A. Yes.

Q. Where was it you saw him; what office?

A. Company; I don't know the number.

Q. Was it at the Insurance Company's office or at Mr. Wright's office?

A. Mr. Wright asked me to go to see the Company. I depended on Mr. Wright.

Q. What did you have with you?

A. Somebody give me a paper; I don't know what it is; I don't know.

The Court: Q. A letter?

A. No; a paper. I gave it to Mr. Wright.

Q. You gave it to Mr. Wright?

A. Yes, sir.

Q. Now, had you ever been to the Maryland Casualty Company's office before you got that letter? A. No; I don't know him before.

(Testimony of Ah Chong.)

Q. Never saw him before? A. No.

Q. Had you ever been up to their offices,—the Maryland Casualty Company's office?

A. No; I had never been there; I go with Mr. Wright; I depended on Mr. Wright.

Q. You depended on Mr. Wright?

A. Yes, sir.

Q. You did not go up there, yourself?

A. No; I did not go, myself.

Q. When was the first time you heard that this woman claimed your boy hurt her?

A. Well, he came to my house to see me; I don't know how he found out where I was.

Q. What did he say first?

A. Well, he gave me paper.

Q. He gave you a paper?

A. I don't know what you call it—a piece of paper. [76]

Q. What did you do with the paper?

A. He told me to go and see a lawyer.

Q. Did you ever hear of any accident before that? A. No.

Mr. Morris: That is all.

Cross Examination

Mr. Treadwell: Q. When you got that paper that they gave you at your house, what did you do with it? A. I took it to Mr. Wright.

Q. How soon after that did you go to the Insurance Company's office?

A. The next day I go to see Mr. Wright, and Mr. Wright said he go see the Company.

(Testimony of Ah Chong.)

Q. How many days after the paper was given to you did you and Mr. Wright go to the Insurance Company? A. He said go right away.

Q. Whom did you see in the Insurance Company? When you went to the Insurance Company, did you see Mr. Berger?

A. Yes, I saw him.

Q. How many times did you go to Mr. Berger's office altogether?

A. I can't remember how many times—two times.

Q. Two times? A. Yes.

Q. As many as three times?

A. I am not sure.

Q. You cannot remember how many times you went there? A. No.

Q. You went there once with Mr. Wright; you went to see Mr. Berger, you say, with Mr. Wright, once? A. One time.

Q. Then there were two times more?

A. The second time, I don't remember Mr. Wright there.

Q. You don't remember whether Mr. Wright was there the second time?

A. I think it was two; but I can't remember.

Q. You only remember once that Mr. Wright was with you? A. The first time, yes.

Mr. Morris: Q. Did anybody ever tell you your policy did not insure you—your insurance—you had no insurance? [77]

LEONG CHEUNG,

called for the defendants; sworn.

The Court: Q. How old are you?

A. I am 20, now.

Q. How long do you live in California?

A. I been here all the time, all my life.

Q. Born here? A. Yes, sir.

Direct Examination

Mr. Morris: Q. You drive Ah Chong's truck?

A. No; I do not drive truck; I am the helper.

Q. You are the helper on the truck?

A. Yes, sir.

Q. Were you helper on the truck in 1937?

A. Yes, sir.

Q. Do you remember the day you stopped at Piccadilly Inn on Sutter Street? A. Yes, sir.

Q. Did you see the lady, Mrs. Tighe, near Piccadilly Inn on that occasion? A. Yes.

Mr. Ryan: If your Honor please, I am going to object on the part of the defendant; the issue of negligence in the state court is not at issue here, and I am going to object to this line of questioning relative to that issue of negligence.

Mr. Morris: I am not trying to prove the issue of negligence. I am trying to prove notice or lack of notice of any accident on the occasion complained of.

The Court: That is preliminary; you may proceed.

(Testimony of Leong Cheung.)

Mr. Morris: Q. Where did you see Mazilla Tighe that day?

A. I saw her on the sidewalk.

Q. Where, on the sidewalk?

A. I don't get the question.

Q. Was she walking, standing up, or lying down, or what? A. She was lying down.

Q. She was lying down? A. Yes, sir.

[78]

Q. Where were you?

A. I was coming out of the restaurant.

Q. The Piccadilly Restaurant?

A. Yes, sir.

Q. When you came through the door, did you see Mazilla Tighe; did you see the lady?

A. Yes, sir.

Q. And she was lying down, you say?

A. Yes, sir.

Q. What did you do? A. I picked her up.

Q. You picked her up? A. Yes.

Q. What did you do then?

A. I picked her up and took her in and set her on the chair; she seemed to be hurt, so I got to do some work—there is something else for me to do, so I called ambulance; and ambulance came and took her away.

Q. What were you doing; did you have a truck there that day, anywhere near the scene of this accident. A. We had the truck across the curb.

Q. Truck across the curb? A. Yes.

(Testimony of Leong Cheung.)

Mr. Treadwell: Q. What do you mean by, "across the curb"?

A. There is the curb here, and a curb across the street.

The Court: Q. Was it on the sidewalk?

A. It was on the sidewalk. The Piccadilly Inn is on this side, and the truck was across the curb.

Q. Did you drive over the curb?

A. No; my boss driver over the curb.

Q. Did you drive over the curb?

A. No; on the next side of the street, there is a curb here, and the truck was over on this side.

Q. On the other side? A. Yes, sir.

Mr. Morris: Q. You were parked across the street from Piccadilly Inn? A. Yes, sir.

Q. What were you doing on the truck?

A. I do all the carrying.

Q. You were doing the carrying? A. Yes.

[79]

Q. You had carried something inside, had you?

A. I carried something in; but I was walking out.

Q. Where were you going when you were walking out and you saw the lady on the sidewalk; where were you going?

A. I was going to the truck to get some more stuff.

Q. To get some more stuff?

A. Yes, sir.

(Testimony of Leong Cheung.)

Q. Were you going to bring that into the Piccadilly Inn? A. Yes, sir.

Q. Then you saw this lady on the sidewalk and you picked her up and took her in?

A. Yes, sir.

Q. Did she tell you how she fell down?

A. No.

Q. Did you run into her? A. No.

Q. Did you ever touch her? A. No.

Mr. Ryan: I renew my objection, if they are going to prove an issue of negligence, which is not in issue here.

Mr. Morris: I am not trying to prove negligence.

Q. When was the first time that you ever heard that Mrs. Tighe was making a claim against you?

The Court: I do not see how that is material here. I think Mr. Ryan's objection is good.

Mr. Treadwell: I think, your Honor, that what counsel is trying to do is to get rid of our defense that we did not receive notice, by showing that he did not know of any accident; so I suppose he would be entitled to show that, but not go any further into it than that.

Mr. Morris: We do not have to report accidents that we do not know of. I am trying to prove that this man did not know that he had an accident.

Mr. Ryan: That can be done by direct question and answer.

(Testimony of Leong Cheung.)

Mr. Morris: Maybe I have gone a little to far afield; but that is my purpose. [80]

Q. Did this woman ever tell you you hurt her?

A. No.

Q. The first you knew about any claim was when the suit was filed? A. Yes, sir.

Q. Did you tell Ah Chong that you had the accident?

A. I did not tell him about any accident; but when he was driving away I told him I picked a lady up.

Cross Examination

Mr. Treadwell: Q. The date of this alleged accident, Ah Chong was driving the truck, on that occasion, was he not?

A. He always did the driving.

Q. On this day, he was driving the truck?

A. Yes, sir.

Q. He drove the truck in a position where he could see you make the deliveries?

A. I don't understand.

Q. Was the position of his truck so that he could see the Piccadilly Inn?

A. Well, it was across the street.

Q. He could see the Piccadilly Inn, could he not? A. Sure.

Q. And, as you came in and out there every time that you got vegetables from the wagon to bring into the Piccadilly Inn, he could see you make deliveries in there, could he not?

(Testimony of Leong Cheung.)

A. Sometimes.

Q. He saw you pick up the woman on the sidewalk, did he not? A. No.

Q. You mentioned it to him after you had done that? A. Yes.

Redirect Examination

Mr. Morris: Q. Did you ever go to the Maryland Casualty Company's office after this suit was filed? A. Yes.

Q. When was that?

A. I can't remember the day; I only remember I took Ah Chong with me.

Q. Were you two by yourselves?

A. Yes, sir.

Q. Did anybody tell you that they were not going to handle this case?

A. Well, I don't remember him saying anything about that.

The Court: Q. What did Mr. Berger say to you? A. Say to me?

Q. Yes. [81]

A. I can't remember the things that he said.

Q. Did he tell you that he could not handle the case? Did he tell you that the insurance did not cover the accident?

A. Maybe he did; but I don't think he did.

Q. What is your best recollection of what he told you?

A. Well, he was going to take care of us.

(Testimony of Leong Cheung.)

Q. What did he say to you? Do you remember what he said to you?

A. I remember he said something about we needed some lawyer to help me along, too.

Q. Is that all you remember?

A. He mentioned something about the insurance, but I don't remember what it was.

Q. Were you there a long time?

A. Pretty long.

Q. Did you talk some time?

A. Yes, sir.

Q. Did he try to explain something to you about the policy? A. No.

Q. Well, you talked a lot?

A. Yes; he asked me how the thing happened and all that.

Q. Did he tell you to go up and see Mr. Wright?

A. I don't remember that.

The Court: Anything further?

Mr. Morris: Q. Ah Chong's business is selling vegetables; a vegetable store and delivery?

A. Yes, sir.

Q. Did anybody ever write you any letter?

A. What kind of a letter?

Q. Did the Maryland Casualty Company ever write you a letter?

A. They wrote me they wanted to have my deposition taken.

Q. They wrote you they wanted to have your deposition taken? A. Yes, sir.

(Testimony of Leong Cheung.)

Q. Is that the only letter they ever wrote you?

A. I think they wrote me two.

Q. Did you read them? A. Yes, sir.

Q. Show him that letter. That letter is addressed to Ah Chong: was it a letter like that, that you had in your hand? [82]

A. I don't think I seen one like this.

Q. But you think you got two letters?

A. Yes, sir.

Q. One was about the deposition. What was the other one about? A. It was a short one.

Q. What was the short one about? Don't you remember? Have you got the two letters?

A. I can go home and look for it; I know it was not this one.

Recross Examination

Mr. Treadwell: Q. Do you remember when Ah Chong got that letter?

A. No.

The Court: Q. Did Ah Chong show you that letter? A. No.

Q. Did he talk to you about it?

A. He told me that the Insurance Company say they are going to sue, or something like that.

Q. Going to sue you? A. Yes, sir.

Mr. Treadwell: Q. Now, you say that you went down to see Mr. Berger. How many times did you go to see Mr. Berger?

(Testimony of Leong Cheung.)

A. I can't remember exactly; but it was more than two times.

Q. It was more than two times?

A. Yes, sir.

Q. Mr. Berger asked you why you didn't let him know about the accident sooner?

A. I don't think so.

Q. Well, didn't he tell you that this was an automobile insurance only?

A. He told me it was an automobile policy; but he didn't say only.

Q. He said it was automobile insurance

A. Yes, sir.

Q. And he told you that you had better get yourself an attorney, didn't he?

A. He didn't say, "better get our own"; but he said to help me.

Q. Did he tell you the Company would not be liable unless it was connected with the automobile?

A. I did not hear him say anything about that.

Mr. Treadwell: That is all. [83]

Redirect Examination

Mr. Ryan: Q. Just one more question: At the time that you went to the office of the Insurance Company, you only went to one office, did you not? You did not go to two offices in the Insurance Company?

A. I think it was only one.

Q. At the time you were there, you saw Mr. Berger and Mr. Donald Seibert, did you not?

(Testimony of Leong Cheung.)

A. I don't know; I only saw him, I think.

Q. You only saw Mr. Berger?

A. Yes, sir.

Q. At that time, he took a report of the accident,—everything that happened there?

A. Yes, sir.

Q. So that all that happened when you went to the office was that he just took a report of the accident?

A. No; he told us something about the policy, too.

Q. The only person you saw then was Mr. Berger? A. Yes, sir.

Q. And that was at the Maryland Casualty building?

A. Yes; I saw one man before, but not that day.

Q. You saw Mr. Seibert?

A. Well, I don't know what his name is.

Q. Another lawyer up there?

A. We did not talk with him there.

Q. Did you see any other lawyer at the Maryland Casualty Company besides Mr. Berger?

A. Not with us.

Q. After you picked up the lady on the sidewalk, you went in and called the ambulance?

A. Yes, sir.

Q. And you told Ah Chong, when you got back to the truck, that you had called the ambulance for the woman, did you not? A. Yes.

Mr. Ryan: That is all.

EARL C. BERGER,

recalled.

Cross Examination

(resumed)

Mr. Morris: Q. Mr. Berger, was Mr. Wright ever in your office? [84]

A. I never spoke to him in our office; I spoke to him over the telephone.

Q. He never was in your office, as far as you know?

A. Not while I was there. He might have been in my office while I was not there.

Q. Mr. Berger, were you still connected with the Maryland Casualty Company in June, 1938?

A. No.

Q. Then, you don't know what, if anything, prompted the bringing of this suit in the Federal court in June, 1938—what led up to that?

A. In June, 1938?

Q. Yes.

A. I was not with the Maryland Casualty Company then.

Mr. Ryan: That is all.

Mr. Treadwell: That is all.

Mr. Morris: That is all of the evidence that we have for the defendants Ah Chong and Leong Cheung.

Mr. Ryan: With reference to the evidence on behalf of Mazilla Tighe, we stand upon the alle-

gations set out in the complaint which we believe are good.

The Court: So far as the testimony is concerned, is the case submitted?

Mr. Treadwell: I think there are one or two things that we can agree on. We have already agreed that the deposition was taken on March 8th. The last accident was November 26, 1937.

Mr. Ryan: I believe that is correct.

Mr. Treadwell: The complaint was filed on January 23, 1938.

Mr. Ryan: I believe that is correct.

Mr. Treadwell: The service of the complaint on the defendants was on what date?

Mr. Ryan: I have not got the date. The service was a week [85] later, if you want to stipulate to that?

The Court: A week later than January 23rd?

Mr. Treadwell: I would not want to stipulate to that.

Mr. Ryan: I will furnish the Court with that date.

Mr. Treadwell: I have here the fact that on February 3, 1938, a stipulation was signed extending the time to answer to February 17, 1938.

Mr. Ryan: What was the date of that?

Mr. Treadwell: February 3rd was the date of the stipulation.

Mr. Ryan: It was some time thereafter.

Mr. Treadwell: Yes, that is true. The complaint was filed January 23rd, and we made a stipulation,

dated February 3rd, extending the time to answer to February 17th.

Mr. Ryan: You answered then?

Mr. Treadwell: On February 17th, the answer was filed. On March 8th, the deposition was taken, and on April 30th a memorandum by the plaintiff to set the case for trial was filed.

Mr. Ryan: Yes, that is correct; and was served on Donald Seibert.

Mr. Treadwell: Served and filed on him on the 17th; and the case was set for trial for June 21, 1938.

Mr. Ryan: Yes.

Mr. Treadwell: And on June 20th, this complaint in the Federal court was filed.

Mr. Ryan: Yes.

Mr. Morris: Will it also be stipulated that George M. Naus was also employed by the Maryland Casualty Company to try the case that was set in June?

Mr. Treadwell: That is correct.

Mr. Ryan: Donald Seibert was attorney of record as far as the case is concerned? [86]

Mr. Treadwell: Yes; but I imagine Mr. Naus was to try the case. That is all.

(Thereupon, the case was submitted on briefs to be filed five, five and five.)

[Endorsed]: Filed Feb. 9, 1940. [87]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS, IN AND FOR THE NINTH CIRCUIT

Notice is hereby given that Maryland Casualty Company, a corporation, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals in and for the Ninth Circuit from the portion of the final judgment entered in this action on November 24, 1939, by which it was ordered, adjudged and decreed [88] as follows:

“4. That the cause of action alleged and involved in the complaint, according to the allegations of the complaint in the state court, and as they developed in the trial of this case, occurred after certain vegetables had been removed from the truck and delivered, but it appears by the evidence here that, if the accident was at all caused by the insured, it was caused while the said Leong Cheung was returning to the truck to obtain from said truck further vegetables for delivery to the said Piccadilly Inn, and that such state action and injury would be and is within the coverage of said policy.

“5. That plaintiff take nothing by its said action and that defendants have and recover from the plaintiff their costs of suit taxed at the sum of \$....., and that the preliminary injunction issued herein be and the same hereby is dissolved.”

Dated: February 2, 1940.

EDWARD F. TREADWELL

REGINALD S. LAUGHLIN

530 Standard Oil Building,

San Francisco, California.

Attorneys for Plaintiff and Appellant

RUSSELL E. BARNES

Of Counsel

[Endorsed]: Filed Feb. 3, 1940. [89]

The premium charge on this bond is \$10.00 per annum.

[Title of District Court and Cause.]

COST BOND ON APPEAL

In Equity No. 4279S

Know All Men by These Presents, That we, Maryland Casualty Company, a Corporation, as Principal, and United States Fidelity and Guaranty Company, a Corporation, having its principal place of business in the City of Baltimore, State of Maryland, and having a paid-up capital of Two Million Dollars (\$2,000,000.00) duly incorporated under the laws of the State of Maryland, for the purpose of making, guaranteeing and becoming surety on bonds and undertakings, and having complied with all the requirements of the laws of the State of California and United States of America

respecting such corporations, are held and firmly bound unto the Defendants in the sum of Two Hundred Fifty and no/100 (\$250.00) Dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, by these presents.

Sealed with our seals and dated this 22nd day of January, 1940.

Whereas, the above named Plaintiff has prosecuted an appeal to the United States Circuit Court of Appeals, Ninth Circuit to reverse the judgment of the District Court of the United States, in and for the Ninth Judicial Circuit, Northern District of California, Southern Division in the above entitled cause.

Now Therefore, the condition of this obligation is such that if the above named Plaintiff shall prosecute its said appeal to effect and answer all costs if the appeal is dismissed or the judgment is affirmed, or such costs as the [90] Appellate Court may award if the judgment is modified, then this obligation shall be void; otherwise to remain in full force and effect.

The undersigned Surety agrees that in case of any breach of any condition hereof the Court may, upon not less than ten days' notice to the undersigned, proceed summarily to ascertain the amount

which the undersigned, as surety, is bound to pay on account of such breach, and render judgment against it and award execution therefor, not to exceed the sum specified in this undertaking.

MARYLAND CASUALTY
COMPANY

By E. C. PORTER

Resident Vice-President

UNITED STATES FIDELITY
AND GUARANTY COMPANY

By ERNEST W. COPELAND

Attorney in Fact [91]

State of California,
City and County of San Francisco—ss.

On this 22nd day of January in the year one thousand nine hundred and forty before me, W. W. Healey a Notary Public in and for the City and County of San Francisco, personally appeared Ernest W. Copeland known to me to be the person whose name is subscribed to the within instrument as the Attorney-in-fact of the United States Fidelity and Guaranty Company, and acknowledged to me that he subscribed the name of the United States Fidelity and Guaranty Company thereto as Surety and his own name as Attorney-in-fact.

[Notarial Seal] W. W. HEALEY

Notary Public in and for the City and County of
San Francisco, State of California.

My Commission expires August 29, 1941.

[Endorsed] Filed Feb. 3, 1940. [92]

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON ON APPEAL

The plaintiff above named hereby designates the following points as the points on which it intends to rely on the appeal herein.

1. The Court erred in finding that the alleged accident and resulting injuries, if any, occurred as the defendants [93] were using the truck in making delivery of produce to a customer, in this (1) that the evidence and findings show that the truck was not used to make such delivery, but delivery was made by an employee of the insured, and (2) that the delivery was complete and the employee at the time of the accident was returning to the truck which at the time was parked on the opposite side of the street.

2. The Court erred in finding that the accident caused by an employee after he had unloaded produce from the truck and carried it by hand across the street and sidewalk and delivered the same to a customer in a building on the opposite side of the street and was returning to the truck for further produce at the time of the accident, is within the coverage of the policy involved herein.

3. The Court erred in finding that because the employee was returning to the truck with the purpose of obtaining produce in order to make further deliveries, the accident resulted from the use of the truck, or from the loading or unloading thereof.

4. The Court erred in holding that the accident involved in the action in the state Court was within the coverage of the insurance policy involved herein.

5. The Court erred in not holding that the accident involved in the action in the state Court was not within the coverage of the insurance policy involved herein.

6. The Court erred in adjudging that plaintiff take nothing by this action, in that it should have adjudged that said accident was not within the coverage of the insurance policy involved herein.

7. The Court erred in not adjudging that plaintiff has no obligation under said policy to defend said action in the [94] state Court.

8. The Court erred in not adjudging that plaintiff has no liability under said policy by reason of the accident involved in the action in the state Court because the said accident did not arise out of the use of the automobile described in and covered by said policy.

9. The Court erred in not enjoining the defendants from taking any proceedings for the purpose of imposing any liability upon plaintiff based upon any judgment that may be rendered for Mazilla Tighe in said action in the state Court.

10. The Court erred in dissolving the preliminary injunction.

11. The Court erred in awarding costs to defendants and in not awarding costs to plaintiff.

Dated: February 8, 1940.

EDWARD F. TREADWELL

REGINALD S. LAUGHLIN

530 Standard Oil Building,

San Francisco, California.

Attorneys for Plaintiff and

Appellant

RUSSELL E. BARNES

Of Counsel

[Endorsed]: Filed Feb. 9, 1940. [95]

[Title of District Court and Cause.]

AFFIDAVIT OF MAILING

State of California,

City and County of San Francisco—ss.

Eve Miller, being first duly sworn, deposes and says:

That at all times herein mentioned her business address was and still is 530 Standard Oil Building, San Francisco, California; that at all times herein mentioned she was and still is a citizen of the United States and a resident of the City and County of San Francisco, State of California, over the age of eighteen (18) years and not a party to the above entitled proceeding;

That on the 8th day of February, 1940, she deposited [96] in the United States mail at said City and County of San Francisco, State of California,

a true copy of the within Statement of Points to be Relied Upon on Appeal and the within Appellant's Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal, enclosed in a sealed envelope with postage fully prepaid, addressed to

Charles B. Morris, Esq.,
Mills Building,
San Francisco, California.

Messrs. Young & Ryan,
1924 Broadway,
Oakland, California.

That there is delivery service and regular communication by mail between the said place of mailing and the place addressed.

EVE MILLER

Subscribed and sworn to before me this 9th day of February, 1940.

[Seal] LULU P. LOVELAND

Notary Public in and for the City and County of
San Francisco, State of California

[Endorsed]: Filed Feb. 9, 1940. [97]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF THE
PORTIONS OF THE RECORD, PROCEED-
INGS, AND EVIDENCE TO BE CON-
TAINED IN THE RECORD ON APPEL

The plaintiff above named, having heretofore filed its notice of appeal in this matter, hereby designates for inclusion in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit the following portions of the record, proceedings and evidence herein:

1. Complaint for Declaratory Relief, Etc.
2. Temporary Injunction.
3. Answer of Defendants Ah Chong and Leong Cheung.
4. Answer by Defendant Mazilla Tighe to Complaint for Declaratory Relief. [98]
5. Pre-Trial Order.
6. Opinion dated September 11, 1939.
7. Judgment signed and entered on November 24, 1939.
8. Findings of Fact and Conclusions of Law.
9. Order Amending Findings.
10. The Notice of Appeal, with date of filing.
11. Statement of Points to be Relied Upon on Appeal.
12. Appellant's Designation of the Portions of the Record, Proceedings, and Evidence to be Contained in the Record on Appeal.

13. All evidence stenographically reported at the trial.

Dated: February 8, 1940.

EDWARD F. TREADWELL

REGINALD S. LAUGHLIN

530 Standard Oil Building,

San Francisco, California.

Attorneys for Plaintiff and

Appellant

RUSSELL E. BARNES

Of Counsel

[Endorsed]: Filed Feb. 9, 1940. [99]

District Court of the United States
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of California, do hereby certify that the foregoing 99 pages, numbered from 1 to 99, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Maryland Casualty Company vs. Mazilla Tighe, Ah Chong and Leong Cheung, No. 4279-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of \$21.05 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 8th day of March A. D. 1940.

[Seal]

WALTER B. MALING

Clerk.

B. E. O'HARA

Deputy Clerk.

[Endorsed]: No. 9473. United States Circuit Court of Appeals for the Ninth Circuit. Maryland Casualty Company, a corporation, Appellant, vs. Mazilla Tighe, Ah Chong and Leong Cheung, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed March 14, 1940.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals in
and for the Ninth Circuit

No. 9473

MARYLAND CASUALTY COMPANY,

Appellant,

vs.

MAZILLA TIGHE, AH CHONG and
LEONG CHEUNG,

Appellees.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL

Comes now the appellant above named and hereby designates the points on which it intends to rely on this appeal to be the points stated in the Statement of Points to be Relied upon on Appeal, which was filed with the District Court of the United States in and for the Northern District of California, Southern Division, on February 9, 1940, and which are set forth on pages 93, 94 and 95 of the certified transcript of record on appeal in the above entitled matter.

EDWARD F. TREADWELL

REGINALD S. LAUGHLIN

Attorneys for Appellant

RUSSELL E. BARNES

Of Counsel

[Endorsed]: Filed Mar. 14, 1940. Paul P.
O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS
OF THE RECORD NECESSARY FOR CON-
SIDERATION ON APPEAL.

Comes now the appellant above named and here-
by designates for consideration of the points on
which it intends to rely on this appeal the entire
certified transcript of record on appeal in the above
entitled matter, and hereby designates for the
printed record on appeal said entire certified tran-
script of record.

EDWARD F. TREADWELL

REGINALD S. LAUGHLIN

Attorneys for Appellant

RUSSELL E. BARNES

Of Counsel

[Endorsed]: Filed March 14, 1940. Paul P.
O'Brien, Clerk.

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